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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

BEN VARNER, SUPERINTENDENT OF SCI SMITHFIELD; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Petitioners

v.

CLAYTON THOMAS

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. Where counsel's action at trial is objectively reasonable, may the conviction nonetheless be reversed on the ground that counsel's subjective thought process is found deficient?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit, in conflict with other circuits.)

2. Where a state court has clearly adjudicated the merits of an ineffective assistance of counsel claim, may a federal court avoid AEDPA deference and invoke de novo review as to any aspect of the claim that, in the federal court's view, has not adequately been addressed in the state court's legal analysis?

(Answered in the affirmative by the Untied States Court of Appeals for the Third Circuit.)

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

ORDERS AND OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

I. The Circuits have split in constructing "objective" and "subjective" elements of the *Strickland* test. This Court should grant *certiorari* to make clear that an attorney's subjective thought processes cannot trump an objectively reasonable rationale for his conduct.

II. This Court's decisions in *Weeks v. Angelone* and *Wiggins v. Smith* have led to confusion concerning the nature of "deference" on habeas review. The Court should grant *certiorari* to make clear that review under § 2254(d) of the habeas act is of the state court's ruling, not its reasoning.

CONCLUSION 26

APPENDIX

Order on Remand, Issuing Writ Federal District Court, March 6, 2006	App. 1
Order Denying Petition for Rehearing Court of Appeals, February 23, 2006	App. 2-3
Judgment Order Court of Appeals, November 4, 2005	App. 4-5
Opinion Court of Appeals, November 4, 2005 (as amended, January 18, 2006)	App. 6-26
Memorandum and Order Federal District Court, June 1, 2004	App. 27-41
Report and Recommendation United States Magistrate Judge September 29, 2003	App. 42-72
Memorandum and Order on Evidentiary Hearing United States Magistrate Judge June 11, 2003	App. 73-109
Opinion Pennsylvania Superior Court December 12, 2001	App. 110-41

TABLE OF AUTHORITIES

Federal Cases

Allen v. Lee, 366 F.3d 319 (4th Cir.) (en banc) 24

Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995) 15

Bullock v. Carver, 297 F.3d 1036 (10th Cir. 2002) 15

Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000) 16

Chatmon v. United States, 801 A.2d 92 (D.C. Cir. 2002) 13

Cofske v. United States, 290 F.3d 437 (1st Cir. 2002) 14

Greiner v. Wells, 417 F.3d 305 (2d Cir. 2005) 13

Kitchen v. United States, 227 F.3d 1014 (7th Cir. 2000) 14

Rompilla v. Beard, 355 F.3d 233 (3d Cir. 2004) 25

Stevens v. Horn, 2006 U.S. App. LEXIS 17043 (3d Cir. 2006) 23

Strickland v. Washington, 466 U.S. 668 (1984) passim

Thomas v. Varner, 428 F.3d 491 (3d Cir. 2005) passim

United States v. Harris, 1993 U.S. App. LEXIS 23096 (9th Cir. 1993) 18

Wanatee v. Ault, 39 F. Supp. 2d 1164 (N.D. Iowa 1999) 18

Weeks v. Angelone, 528 U.S. 225 (2000) 21, 22, 24

Wiggins v. Smith, 539 U.S. 510 (2003) 21, 22, 24

State Cases

Commonwealth v. Napper, 385 A.2d 521 (Pa. Super 1978) 19

Commonwealth v. Stevens, 739 A.2d 507 (Pa. 1999) 23

Commonwealth v. Thomas, 792 A.2d 1288 (Pa. Super. 2001) 11

Florida Bar v. Sandstrom, 609 So. 2d 583 (Fla. 1992) 18

In re Lewis, 445 N.E.2d 987 (Ind. 1983) 18

James v. Commissioner of Corrections, 2001 Conn. Super. LEXIS 1877 (Conn. Super 2001) 18

Federal Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254(d) passim

Other Authority

Black's Law Dictionary, 7th ed. 9

Webster's New International Dictionary, 2d ed. 9

Federal Habeas Corpus Practice and Procedure, Hertz & Liebman, 5th ed. 24

ORDERS AND OPINIONS BELOW

The United States Court of Appeals for the Third Circuit affirmed the district court order granting a writ of habeas corpus. The court of appeals opinion was issued on November 4, 2005, and amended January 18, 2006. The opinion is reported at 428 F.3d 491 (3d Cir. 2005), and is reprinted in the Appendix at App. 6-26.

The June 1, 2004, memorandum and order of the federal district court is reprinted in the Appendix at App. 27-41. The September 29, 2003, report and recommendation of the United States magistrate judge is reprinted in the Appendix at App. 42-72. The June 11, 2003 memorandum and order of the magistrate judge, granting an evidentiary hearing, is reprinted in the Appendix at App. 73-109.

The memorandum opinion of the Pennsylvania Superior Court, affirming the denial of state post-conviction relief, was issued on December 12, 2001. The opinion is reprinted in the Appendix at App. 110-41.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a criminal defendant convicted of murder in state court. Petitioners seek review of the order of the United States Court of Appeals of the Third Circuit upholding the order of the district court, which granted the writ and ordered the defendant retried or released. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, which provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

28 U.S.C. § 2254(d), which provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

Respondent, Clayton Thomas, entered the home of a 67-year-old man in order to rob him. When the victim tried to resist, Thomas shot him. When an eyewitness tried to flee, Thomas asked if he "wanted some too," and then shot him as well. While the first victim lay dying, Thomas went through his pockets, and then left.

Harry James, the elderly victim, ran an informal tavern, selling beer and snacks out of his house. Neighbors came by to drink and talk; children were given candy and chips. On the night of the crime, December 9, 1992, Clayton Thomas determined to rob the place. He tried to enlist the assistance of Christopher Young, a friend of his son, but Christopher – who lived on Harry's block and was a regular visitor at the house – refused. N.T. 5/25/94, 110-13, 176-78.

Later that evening, Christopher stopped by Harry's house to get some beer. Another neighbor was also there, playing chess with Harry at the table. Then Thomas showed up, with his son. While the son stayed in the vestibule, Thomas entered the living room, pulled out a gun, and ordered everyone to lie down. Harry wouldn't go along. He grabbed for Thomas. The gunman shot him in the chest. N.T. 5/25/94, 113-21, 178-80.

Meanwhile the chess player – Peter Fuller – tried to escape out the back of the house. Thomas taunted him and took aim. Fuller ducked, but the bullet hit him in the shoulder. He was not injured as seriously as Harry, who was trying to breathe as blood spurted from his chest wound. Before leaving, Thomas bent down to rifle through Harry's pockets. N.T. 5/25/94, 121-27, 180.

Although the murder occurred directly in front of two eyewitnesses, Christopher Young and Peter Fuller, both were initially reluctant to make identifications to authorities. Christopher Young at first denied knowing the murderer at all. Some weeks later, acknowledging that the matter had been bothering him, Christopher told police what he knew, leading to the arrest of Thomas and his son. At the

preliminary hearing, though, in front of the defendants and their supporters, Christopher backed off important details, and claimed that he had given the statement because police had threatened to arrest him for the murder if he did not tell them something. N.T. 3/25/93, 54-64, 69-86.

Peter Fuller gave a description of the shooter but no name. The description turned out to match Thomas, down to the telltale pockmarked skin on his face. But later, when he viewed photos of Thomas and the son, Fuller would provide only a tentative identification. Then, at the preliminary hearing, Fuller maintained that he was not really sure if he had seen the defendants. He claimed that he had identified their photographs only because the investigating detective picked their pictures out of the array and suggested them as the perpetrators. N.T. 3/25/93, 16-27, 43-52; 9/9/03, 18-19.

Early in the proceedings, Thomas's attorney filed a blanket motion to suppress evidence. N.T. 8/27/03, 12-13. By the time of the 1994 trial, however, a year and a half after the crime, both defendants' lawyers made the decision to withdraw their motions, which went only to identification. N.T. 5/23/94, 2). (There were no confessions and no physical evidence was recovered.)

The defense strategy was made clear from the first moments of the trial, in opening statements. Thomas's attorney argued that the checkered history of the witnesses' identifications was the product not of simple unreliability, but of fabrication by the police. He asserted that police had a "grudge" against his client, and "are now imposing their will upon these witnesses. This is what is holding these people."

Defense counsel pursued these themes throughout cross-examination. He elicited testimony from Christopher Young that it was the police who suggested to him the identity of the perpetrators, that the detective "got ticked off" when Young wouldn't make an ID, that police threatened to pin the crime on him, and that he wasn't "going down for any murder." N.T. 5/25/94, 63-64, 70-71, 77-79, 92.

When Peter Fuller testified, defense counsel examined the photo array process in detail, establishing that Fuller viewed hundreds of photographs, but failed to make any kind of identification until the investigating detective retrieved two of the photos and said they were the criminals. Counsel ended the cross-examination by having the witness reiterate that, if the detective had not singled out the two pictures, Fuller would not have picked anyone. N.T. 5/25/94, 137-42, 146, 155.

Counsel then covered the same ground when the investigating detective took the stand. The detective denied any pressure or suggestive conduct, putting him in conflict with Peter Fuller's testimony. N.T. 5/25/94, 214-20, 223.

In his closing argument, counsel quickly capitalized on these points. He accused the police of a "cover-up." But for the manufactured evidence against the defendants, "the case remains unsolved and they have to go back and see who really did it." Accordingly, argued counsel, "[s]omebody has to be blamed." N.T. 5/26/94, 62-63.

Counsel capped off the cover-up charge by using it to tie together his attacks on the two eyewitnesses. Counsel pointed out that Peter Fuller had directly contradicted the detective's testimony about the suggestive conduct of the

photo array. Counsel intimated that the detective was "lying" on that point. And if he was lying about Fuller, suggested counsel, wouldn't he "lie" about Young as well? N.T. 5/26/94, 73-74. In this manner, counsel was able to use the evidence concerning Fuller's identification as a means of bolstering his challenge to Christopher Young's testimony.

In response, the prosecutor pointed out to the jury that, despite their prior reticence, both eyewitnesses had appeared at trial and positively identified Clayton Thomas as the murderer. He noted that the witnesses had been understandably frightened of retribution for snitching on a killer. He argued that random details in the witnesses' statements and testimony could not have been invented, and that the police, if they had really been trying to frame the defendants, would have created a stronger case. N.T. 5/26/94, 79-111.

In the end, the jury credited the evidence of guilt. After four days of trial, Thomas was convicted of second degree (felony) murder and related offenses. The judge imposed a life sentence, which was mandatory under state law. Thomas's son, whom the witnesses claimed they could not clearly see as he stood in the vestibule, was acquitted. App. 74, 111.

Thomas pursued a direct appeal with new counsel, but the conviction was affirmed in 1998. Thomas filed a state post-conviction petition in 1999, again receiving new counsel. In it he raised, among other claims, the assertion that trial counsel was ineffective for failing to seek suppression of Peter Fuller's identification. The petition was denied in 2000 and Thomas appealed. App. 111-12.

The Pennsylvania Superior Court (the intermediate state appellate court) addressed Thomas's various contentions in a 34-page opinion in 2001. The court discussed in detail the defense police fabrication theory, noting that it was the "leitmotif" of the entire trial. App. 121-24. In light of the defense presented at trial, the court rejected the ineffectiveness/suppression claim:

> The basis for trial counsel's decision not to seek suppression of [Fuller's] identification is obvious of record from the manner in which the witness was cross-examined at trial. The witness's testimony concerning the circumstances surrounding his pre-trial identification of Appellant's photograph clearly was relevant to trial counsel's strategy of proving that the police were trying to frame Appellant for a crime he did not commit so they could close their books on the incident. Trial counsel wanted to demonstrate the overreaching behavior in which Detective Piree engaged and the lengths to which the detective was willing to go to frame Appellant. Letting the jury hear that Detective Piree essentially coerced Mr. Fuller into identifying photographs of Appellant and his co-defendant materially advanced this strategy. We have considered the entirety of Mr. Fuller's testimony and find that the equivocal nature of his pre-trial identification was well emphasized during cross-examination. Under these circumstances, we conclude that trial counsel was not ineffective for failing to seek suppression, nor was he ineffective for failing to object to testimony that supported the defense theory that the police were framing Appellant.

App. 128-29. Thomas sought discretionary review of the Superior Court's ruling in the Pennsylvania Supreme Court, but the petition was denied. App. 75.

Thomas filed a federal habeas corpus petition in 2002. The United States magistrate judge first ruled that Thomas was entitled to an evidentiary hearing. The judge determined that he would not follow the reasoning of the Pennsylvania Superior Court, because the state court had drawn conclusions from the trial record without hearing testimony from trial counsel about his thought processes on the matter. The magistrate judge believed that he could resolve the claim only on the basis of counsel's asserted rationale for his conduct. App. 97-98.

At the evidentiary hearing, trial counsel was called to the stand by Thomas's current attorney. In his testimony, counsel said nothing at all about the extensive record concerning his use of the Fuller identification evidence in support of the police fabrication theory. Instead, counsel claimed that the only reason he did not seek suppression at trial was that he had already withdrawn the motion, and he was under the mistaken impression that state law would not allow him to resurrect it. N.T. 8/27/03, 8-15.

Counsel's testimony was sufficient to secure relief for his former client. Three weeks after the hearing, the magistrate judge issued a report and recommendation concluding that, in light of counsel's "own words," there was no reasonable basis for his conduct. App. 53. The judge recommended grant of the writ.

The federal district judge accepted the recommendation in 2004. The court's opinion described the

contrary ruling of the Pennsylvania Superior Court as a "factual finding" that, in light of the federal evidentiary hearing, was not supported by the record. App. 30.

The state appealed to the United States Court of Appeals for the Third Circuit. That court affirmed the grant of the writ in 2005, and denied the state's petition for rehearing in February 2006. App. 2-3, 6-26.

REASONS FOR GRANTING THE WRIT

I. The Circuits have split in constructing "objective" and "subjective" elements of the *Strickland* test. This Court should grant *certiorari* to make clear that an attorney's subjective thought processes cannot trump an objectively reasonable rationale for his conduct.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court set the test for reviewing claims of ineffective assistance of counsel under the Sixth Amendment. The Court stated that such claims must be assessed under "an *objective* standard of reasonableness." *Id.* at 688 (emphasis supplied).

Strickland provides no special definition for "objective," leaving the word to its ordinary meaning: "emphasizing or expressing the nature of reality as it is apart from self-consciousness; treating events or phenomena as external rather than as affected by one's reflections or feelings." *Webster's New International Dictionary*, 2d ed., unabridged, at 1679; *see also Black's Law Dictionary*, 7th ed.,

at 1101 ("of, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions").

Nevertheless, a conflict has arisen among the circuits concerning a crucial point in ineffectiveness analysis: what to do with testimony by allegedly ineffective attorneys about their perceptions, feelings, and intentions concerning the conduct under challenge. Some circuits, while recognizing that counsel's statements may help establish the context for evaluating objective reasonableness, nonetheless hold that a lawyer's explanation of his rationale – or lack of one – can never be dispositive in a *Strickland* analysis. Several circuits, however, hold that an attorney's misplaced or deficient justification for his conduct can provide a basis for ineffectiveness relief, even if other lawyers could have articulated reasonable grounds for following exactly the same course.

This case is an example of the latter view. The defendant was convicted of first degree murder. Later, he asserted that his trial attorney was ineffective for failing to seek suppression of a pre-trial identification by one of the eyewitnesses.

The state appellate court denied relief without requiring a hearing on the claim, ruling that failure to file the suppression motion was objectively reasonable, regardless of this lawyer's actual thoughts on the matter. The court observed that the witness in question testified at trial that he had been pushed by police into picking out the defendant's photo. This testimony supported the defendant's claim that he was being framed – dovetailing with evidence that the only other eyewitness (whose identification was not subject

to suppression) had also been pressured by police to testify against the defendant. App. 121-24, 128-29; *Commonwealth v. Thomas*, 792 A.2d 1288 (Pa. Super. 2001) (memorandum opinion), *appeal denied*, 805 A.2d 523 (Pa. 2002).

The Third Circuit, however, never even discussed the "frame-up" strategy revealed by the trial record and relied on by the state court. Instead the circuit focused on the evidentiary hearing that had been granted the defendant once he reached federal habeas court. At that hearing, trial counsel testified that he failed to file a suppression motion because he thought – erroneously, as it turned out – that he had missed the deadline for doing so.

The court of appeals began by stating that *Strickland* contains both "subjective and objective facets." App. 17; *Thomas v. Varner*, 428 F.3d 491, 499 n.6 (3d Cir. 2005). The court then laid out the standard it would apply:

> To overcome the Strickland presumption that, under the circumstances, a challenged action might be considered sound trial strategy, a habeas petitioner must show *either* that: (1) the suggested strategy *(even if sound)* was not *in fact* motivating counsel or, (2) that the actions could never be considered part of a sound strategy. *It is the former showing that we are presented with here.*

App. 17; 428 F.3d at 499 (emphasis supplied).

From this starting point, the result was to be expected. To be sure, the opinion includes standard boilerplate references to "objective reasonableness." App. 20; 428 F.3d at 501 & n.10. But in reality the court's analysis was

circumscribed by what in fact motivated this particular lawyer. Thus the court noted and reiterated that, as a matter of state law, trial counsel was wrong in believing he was too late to file a suppression motion. App. 19, 21; 428 F.3d at 500 n.9, 501 n.11. Accordingly, the case became straightforward: "Courts have routinely declared assistance ineffective when the record reveals that counsel failed to make a crucial objection or to present a strong defense solely because counsel was unfamiliar with clearly settled legal principles." App 20; 428 F.3d at 501 (internal quotations omitted).

"[A]bsent some informed strategy," therefore, counsel must be declared ineffective in the Third Circuit's view, App. 21; 428 F.3d at 501, without regard to whether other lawyers might have taken the same action but explained it more reasonably. Indeed the opinion goes so far as to suggest that courts should not "reward" incompetency of counsel by relying on "hypothetical strategies" to excuse what were in fact uninformed oversights. App. 17-18; 428 F.3d at 499 n.7.

The Third Circuit's lawyer-specific, subjective approach to ineffectiveness analysis is shared by at least three other courts of appeal:

D.C. Circuit

> A threshold question arises whether, on appeal, we consider the adequacy of counsel's performance in light of any possible strategies that would explain defense counsel's actions, or whether we consider only those trial strategies and tactics that counsel actually embraced as disclosed either in an affidavit, as in this case, or in testimony at a hearing....

> [W]e could conclude that our evaluation is an objective one: if counsel's action could be justified by sound trial strategy, it should not be considered deficient, even if it was not defense counsel's actual trial strategy.
>
> We are not persuaded that is the proper course.... [J]ust as we do not burden counsel's actual tactical choices with the benefit of tactics as disclosed by hindsight, ... neither do we salvage them on that basis.
>
> Therefore, once the record establishes the actual tactical explanation for counsel's actions, the government is not free to invent a better-reasoned explanation of its own.

Chatmon v. United States, 801 A.2d 92, 108-09 (D.C. Cir. 2002).

2d Circuit

> [W]e conclude that [counsel] pursued an objectively reasonable course of action.... But that does not end the matter, for we must also examine counsel's decision-making processes so that if we discover, for instance, that counsel's decisions resulted from incompetence, negligence, or pure serendipity, we might reconsider any assumption that a "choice" made by counsel was strategic.

Greiner v. Wells, 417 F.3d 305, 320 (2d Cir. 2005).

7th Circuit

> The government is correct that, as a general matter, failing to pursue a particular issue is not necessarily deficient performance.... But we must consider, along with other circumstances, the reason or reasons why an attorney takes (or fails to take) a particular action.
>
> Counsel's failure [to pursue the issue on appeal] here was not the product of any such strategic decision. Counsel has freely admitted that he failed to [do so] through "inadvertence."

Kitchen v. United States, 227 F.3d 1014, 1020 (7th Cir. 2000).

In contrast, at least four circuits reject this subjective approach, asking what a reasonable attorney would have done, without regard to the actual internal thought processes of the lawyer in question.

1st Circuit

> If anything turned on counsel's precise thought process, we would remand for an evidentiary hearing, but in this case none is necessary. The Strickland test, as already noted, is an objective one; as long as counsel performed as a competent lawyer would, his or her detailed subjective reasoning is beside the point.

Cofske v. United States, 290 F.3d 437, 444 (1st Cir. 2002).

9th Circuit

> Because we use an objective standard to evaluate counsel's competence, once an attorney's conduct is shown to be objectively reasonable, it becomes unnecessary to inquire into the source of the attorney's alleged shortcomings.... Because we conclude, as the district court did, that [counsel]'s performance did not fall below the standard of objective reasonableness, it is irrelevant whether counsel used drugs.

Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995).

10th Circuit

> It appears, as [the defendant] contends, that at least one of his attorneys ... did not fully grasp [applicable law] and erroneously concluded that the children's hearsay statements ... would be admitted under any circumstances.... We conclude, however, that a fully informed attorney could have concluded that admitting the hearsay statement was to [the defendant's] advantage and, therefore, that his attorney's performance was not objectively unreasonable.

Bullock v. Carver, 297 F.3d 1036, 1053-54 (10th Cir. 2002).

11th Circuit

> To uphold a lawyer's strategy, we need not attempt to divine the lawyer's mental processes underlying the strategy....

> If some reasonable lawyer might have not pursued a certain defense or not called a certain witness, we fail to understand why we would order a new trial on the ground that the actual lawyer had not used the defense or witness in the first trial: at the new trial, a different lawyer (even a reasonable one) might again not use the witness or defense. If two trials are identical, one should not be constitutionally inadequate and the other constitutionally adequate.

Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000).

The number of cases affected by this circuit conflict is unusually high, because ineffective assistance is perhaps the most frequently litigated issue in the field of criminal law. The impact is especially significant in federal habeas review of state convictions, where the subjective/objective distinction affects application of all the special rules that have been created to accommodate federalism concerns: deference, evidentiary hearings, procedural default, and exhaustion. Even aside from such procedural matters, the difference between a subjective and an objective analysis of ineffectiveness claims is often outcome-determinative.

The need for resolution by this Court, moreover, goes beyond reconciliation of conflicting cases. The divergent approaches seen here raise basic questions about the very nature of the Sixth Amendment right to effective assistance of counsel. If objective reasonableness is not the end of the matter – if the court must instead assess the wisdom of counsel's actual rationale for his actions – then the constitutional inquiry is about the representation counsel tried to deliver rather than the representation the defendant

actually received. Two co-defendants, whose counsel both fail to make a particular objection at their joint trial, may achieve different results where one lawyer gives a persuasive explanation of his conduct and the other admits that he just wasn't listening. Relief depends on the idiosyncracies of the particular attorney.

On the other hand, under an objective standard the court may indeed "speculate" about "hypothetical strategies," just as the Third Circuit noted here. 428 F.3d at 500, n.7 & 8; app. xx. But that is the very nature of reasonableness review. The "reasonable man" is not an oracle but a judicial construction; courts must infer from circumstance and experience whether the conduct in question falls within the wide range of professionally competent assistance. And, again as the Third Circuit pointed out, an objective test will tolerate the attorney who, through serendipity or sloth, stumbles onto the same strategy that a more insightful lawyer would have followed. But that is the appropriate result. The right in question is defined by assessing prevailing norms, not by grading counsel's performance.

There are also more pragmatic implications to the distinction between a subjective and an objective benchmark. If courts may consider only the rationale in the mind of the specific trial lawyer in the case, then the attorney's motivations in characterizing that rationale may skew the review process in a particular direction. Perhaps, out of professional ego, the lawyer will dress up his conduct as best he can. More often, a committed defense lawyer will regret his trial losses and will feel greater allegiance to his former client than to the prosecutor seeking to sustain the sentence. As a result it is not uncommon for defense lawyers to concede their own ineffectiveness, thereby voiding the

conviction they could not avoid at trial. And there is little disincentive to doing so. Counsel almost never suffer professional discipline after a finding of ineffectiveness.[1] To the contrary – they often receive kudos from the courts for their "candor."[2]

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[1] *See, e.g., Florida Bar v. Sandstrom*, 609 So. 2d 583, 584 n.1 (Fla. 1992) ("We note that most cases of ineffective assistance of counsel do not rise to the level of a disciplinary violation"); *In re Lewis*, 445 N.E.2d 987, 989 (Ind. 1983) ("the fact that post-conviction relief was granted is not controlling.... Our finding of misconduct must be predicated on independent grounds.... We cannot find ... that Respondent's conduct ... is in violation of the Code of Professional Responsibility").

[2] *See, e.g., Wanatee v. Ault*, 39 F. Supp. 2d 1164, 1172 (N.D. Iowa 1999) ("In both the *habeas corpus* proceedings and the state-court post-conviction relief proceedings that preceded them, trial counsel stated that he did not believe his representation of Wanatee had been effective in this respect. The court admires trial counsel's honesty and conscientiousness in making such a self-evaluation"); *United States v. Harris*, 1993 U.S. App. LEXIS 23096, at *6 (9th Cir. 1993) (unpublished) ("in a notable instance of candor, counsel himself admits, and submits a declaration in support thereof, that the omission of the Vargas issue amounted to ineffective assistance in violation of Strickland"); *James v. Commissioner of Corrections*, 2001 Conn. Super. LEXIS 1877, at 4-5 (Conn. Super 2001) ("During testimony at the habeas trial defense counsel at the criminal trial gave as her reason for not raising it on the record that she simply forgot to raise it.... The Court admires the candor of the defense

(continued ...)

Of course, even when ineffectiveness is judged objectively, counsel's testimony may be relevant – either 1) to establish the facts on which he acted, *see, e.g., Strickland*, 466 U.S. at 691 ("inquiry into counsel's conversations with the defendant may be critical"), or 2) to suggest objective bases for such conduct that might not otherwise have been discerned merely from reading the record. Counsel's statements about the nature of his own reasoning process, however, can never limit or overcome consideration of objectively reasonable rationales, whether or not they are actually identified by counsel. At least not as *Strickland* is understood in some of the courts of appeal.

In fairness, some of the confusion in applying *Strickland* may have arisen from *Strickland* itself – specifically its language about the "presumption" – the "strong presumption" – of professional competence. 466 U.S. at 688-89. These references to a presumption of effectiveness are certainly meaningful as an exhortation that ineffectiveness claims must be judged against the wide range of reasonable professional assistance, under the

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attorney.... [H]er failure to object on the record ... was below the standard of competence"); *Commonwealth v. Napper*, 385 A.2d 521 (Pa. Super 1978) ("At a [post-conviction] hearing, appellant's trial counsel all but admitted that he had been ineffective in failing to advise appellant fully on the advisability of accepting a plea bargain. Under the circumstances of this case, we agree with counsel; and while we regret his ineffectiveness, we commend his candor").

circumstances as they existed at the time, without the blinding light of hindsight. But as an actual legal framework for deciding Sixth Amendment claims, the language of presumptions may have proven less useful.

Thus, for those courts hewing to an objective view of ineffective assistance analysis, the notion of presumption does little to advance the inquiry. The conduct either falls within the wide range of reasonableness, or it does not. Once it is determined that some reasonable lawyer would have taken the action in question, then effective assistance is not just presumed – it is established.

For those courts employing a subjective ineffectiveness analysis, in contrast, presumptions do too much. These courts appear to apply the presumption language more literally: if there is a general presumption that lawyers are effective, but the presumption is not conclusive as a matter of law in all cases, then there must be a way to rebut that presumption factually in individual cases. What better manner of testing whether the presumption is true in a particular case than by determining what the attorney in that case was really thinking? The problem with this approach is that it effectively reverses the *Strickland* "presumption," by narrowing the wide range of reasonable competence down to the actual thoughts within that one attorney's mind. Subjective displaces objective.

In light of the disparities among the courts of appeal in adjudicating ineffective assistance claims, and because such claims have come to occupy so much space in review of both state and federal criminal judgments, this Court should grant certiorari to clarify its *Strickland* test.

II. This Court's decisions in *Weeks v. Angelone* and *Wiggins v. Smith* have led to confusion concerning the nature of "deference" on habeas review. The Court should grant *certiorari* to make clear that review under § 2254(d) of the habeas act is of the state court's ruling, not its reasoning.

In *Weeks v. Angelone*, 528 U.S. 225, 237 (2000), this Court held that, if a state court rejects a claim on the merits – without discussing any aspect of the reasoning in support of its ruling – the ruling is still entitled to deferential review under § 2254(d).

In *Wiggins v. Smith*, 539 U.S. 510, 534 (2003), this Court stated that, where a state court rejects an ineffective counsel claim on the merits – without discussing the prejudice aspect of the ineffectiveness claim – the prejudice aspect is thereby subject to de novo review.

The interplay of these two decisions has raised a critical question in the application of the deference standard: does de novo review apply as to any issue or argument that was not addressed by the state court? What happens when the state court was not completely silent as to its reasoning, but does not discuss a point of law or fact that the federal habeas court believes is necessary for resolution of the claim?

This is a threshold issue in almost every habeas case; yet *Wiggins* provides a poor basis for resolving it. In *Wiggins*, the state court determined that counsel had a reasonable basis for his actions, and therefore – as this Court

itself has directed – the court had no need to decide the prejudice prong.[3] When the case reached this Court, the briefs argued the merits of the prejudice issue, but did not consider whether it should carry a separate standard of review. Nor was there any such consideration at oral argument. Interest about the standard of review arose for the first time only in this Court's opinion, where discussion of the point consisted of a one-sentence declaration, without citation to *Weeks*, to the statutory provision in question, or to any other authority of any kind. *Wiggins*, 539 U.S. at 534. So lower courts were left without guidance on the deference "partial silence" problem.

This case is an example of the unhappy result. The Third Circuit not only distinguished between the two prongs of the *Strickland* test, but further purported to subdivide the first prong for purposes of determining the applicable standard of review. Thus the court stated that "[o]ur review of whether counsel's conduct was objectively unreasonable is de novo, as the Pennsylvania courts never reached this issue, having denied the claim on strategy grounds." App. 21; 428 F.3d at 501. It is unclear what the court meant by "objective unreasonableness" as distinct from "strategy grounds," but it is clear that the court perceived both notions to relate to *Strickland*'s first component – as opposed to prejudice, the second component, which the court addressed later in a separate section of its opinion. App. 23; 428 F.3d at 502

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[3] *Strickland*, 466 U.S. at 697 ("there is no reason for a court deciding an ineffective assistance claim ... even to address both components of the inquiry if the defendant makes an insufficient showing on one").

("As with objective reasonableness, we review prejudice de novo, as it is a legal issue never considered in the Pennsylvania court proceedings"). The Third Circuit never considered, however, whether the deference standard is appropriately extended or withheld on a point-by-point basis, to parts and subparts of claims rather than to claims as a whole. Indeed, the totality of the court's § 2254(d) analysis consisted of the two sentences quoted here.

Another recent case shows the same divide-and-conquer approach to determining the standard of review under § 2254(d). In *Stevens v. Horn*, 2006 U.S. App. LEXIS 17043 (3d Cir. 2006) (unpublished), the claim under review was that trial counsel was ineffective for not presenting a diminished capacity defense to negate specific intent to kill. The state supreme court had explicitly resolved this claim on prejudice grounds, concluding that the evidence of specific intent was overwhelming and would not have been affected by the newly proffered testimony on diminished capacity. *Commonwealth v. Stevens*, 739 A.2d 507, 515-16 (Pa. 1999). On federal habeas review, the district court also addressed an alternative argument against prejudice – that the proffered testimony did not properly relate to diminished capacity at all. The Third Circuit held that only the former, but not the latter, theory was subject to deferential review: "In its analysis of the *Strickland* prejudice prong, the Pennsylvania Supreme Court did not rely on this thinking. *See Stevens*, 739 A.2d at 515-16. Accordingly, there is no issue of legal deference as to this." 2006 U.S. App. LEXIS at *11 n.5. Apparently, federal courts must now engage in hairsplitting to tease out each individual strand of the state court's

"thinking" in order to know the correct standard from which to begin their review.[4]

Yet it is far from self-evident why a state court ruling with no stated reasoning, as in *Weeks*, is entitled to more deference than a state court ruling with extensive reasoning, as in the two examples above. Section 2254(d) was enacted precisely to require greater respect for state court judgments from federal courts. Congress could hardly have imagined that comity would be advanced by inviting federal courts to go hunting for "holes" in the thought processes of state judges who diligently explain their decisions.

The more natural reading of the statute has been articulated by then-Judge Alito.

> For purposes of the habeas statute, a failure to decide affects the standard of review; a failure to discuss (either at all or to the satisfaction of the habeas petitioner or the federal court) is irrelevant....
>
> [I]f an examination of a state court opinion reveals that the state court did not decide a federal claim on the merits, the deferential standards of

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[4] *See, e.g., Allen v. Lee*, 366 F.3d 319, 343 n.3 (4th Cir.) (en banc) (Gregory, J., concurring in the judgment in part) (relying on *Wiggins* for proposition that habeas courts may apply deference only as to reasons specifically articulated by state court); *Federal Habeas Corpus Practice and Procedure*, Hertz & Liebman, 5th ed., § 32.2. at 1569 (deference inapplicable if state court decision did not discuss all "dimensions" of federal constitutional analysis).

> review set out in § 2254(d)(1) do not apply.... But if the state court decided the claim, the § 2254(d)(1) standards govern – regardless of the length, comprehensiveness, or quality of the state court's discussion.

Rompilla v. Beard, 355 F.3d 233, 247-48 (3d Cir. 2004), *rev'd on other grounds*, 545 U.S 374 (2005).

A contrary view not only undermines comity; it also risks reducing the deference standard to near-meaninglessness. Virtually any disagreement with a state court's reasoning can readily be rephrased as a failure to adjudicate. If a state court erred by relying on an overruled federal precedent, for example, then it failed to discuss the overruling precedent. If the state court erred by emphasizing irrelevant testimony, then it failed to address the more relevant evidence. Such errors may well make the state court ruling unreasonable under § 2254(d). But they should not subject it to de novo review.

In the end, the scope of the deference standard must be defined according to the express terms of the statute. Section 2254(d) provides for deferential review when a "*claim*" was adjudicated on the merits in state court. The object of the adjudication that gives rise to deference is a *claim* – not an element, an argument, a proposition, a prong, or any other constituent of a claim. Accordingly, a federal court may not withhold deference based on perceived deficiencies in the state court's analysis, because the claim has been adjudicated on its merits whether or not the federal court agrees with every step in the decision-making process.

The new standard of review established in § 2254(d) was a cornerstone of the 1995 habeas reform legislation. It is appropriate to resolve the tension in this Court's decisions concerning proper application of the provision.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAYTON THOMAS	:	**CIVIL ACTION**
	:	
v.	:	
	:	
BEN VARNER, *et al.*	:	**NO. 02-4778**

ORDER

Filed: March 9, 2006
Entered: March 10, 2006

AND NOW, this 8th day of March, 2006, in accordance with the Order of the Third Circuit Court of Appeals entered on March 6, 2006, it is **ORDERED** that:

1. The Petition for Writ of Habeas Corpus is **GRANTED**.

2. The execution of the writ of habeas corpus is **STAYED** for 180 days from the date of this Order. Petitioner shall be re-tried within one hundred and eighty (180) days from the date hereof or be released.

BY THE COURT:

/s/
BRUCE W. KAUFFMAN, J.

App. 2

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2856

CLAYTON THOMAS

v.

BEN VARNER; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 02-cv-04778)
District Judge: Honorable Bruce W. Kauffman

Argued April 22, 2005

SUR PETITION FOR PANEL REHEARING

Present: ROTH, FUENTES and STAPLETON,
Circuit Judges

The Petition for Rehearing filed by the Appellants in the above-entitled matter, having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing by this panel, the Petition for Rehearing is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: February 23, 2006
RLS/cc: HTK
DS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2856

CLAYTON THOMAS

v.

BEN VARNER; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 02-cv-04778)
District Judge: Honorable Bruce W. Kauffman

Argued April 22, 2005
Before: ROTH, FUENTES, and STAPLETON,
Circuit Judges.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on April 22, 2005.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the District Court entered June 1, 2004, be and the same is hereby AFFIRMED. The matter is remanded to the District Court for the issuance of a writ of habeas corpus directing that Thomas be re-tried within one hundred and eighty (180) days or be released.

Attest:

/s/ Marcia M. Waldron
Clerk

DATED: November 4, 2005

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2856

CLAYTON THOMAS

v.

BEN VARNER; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 02-cv-04778)
District Judge: Honorable Bruce W. Kauffman

Argued April 22, 2005
Before: ROTH, FUENTES, and STAPLETON,
Circuit Judges.

(Filed: November 4, 2005;
Amended: January 18, 2006)

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ATTORNEY FOR APPELLEE

OPINION OF THE COURT

FUENTES, *Circuit Judge.*

Following a jury trial, Clayton Thomas was convicted of the shooting death of Harry James, the owner of a speakeasy in Philadelphia. He was also convicted of crimes related to the wounding of Peter Fuller, a patron of the speakeasy. Thomas alleges that his identification by Fuller was tainted by an unconstitutionally suggestive photo array and that his trial counsel was ineffective for failing to move to suppress or otherwise object to Fuller's identification at trial. After finding defense counsel's performance deficient, the District

Court issued a writ of habeas corpus directing the Commonwealth to retry or release Thomas. Because we agree with the District Court that counsel's error in failing to move to suppress or object to the identification at trial fatally undermined the reliability of the verdict, we will affirm.

I.

The facts underlying this appeal were succinctly summarized by the Pennsylvania Superior Court in rejecting Thomas's appeal in his state post-conviction proceedings:

> The charges stemmed from the robbery of a speakeasy located in the City of Philadelphia. Accompanied by a person who acted as lookout, [Thomas] entered the speakeasy brandishing a firearm and ordered the occupants to the floor. The proprietor of the establishment, Harry James, had been playing chess with a customer, Peter Fuller. Mr. James was fetching a beer for another customer when [Thomas] arrived. Instead of complying with [Thomas's] order, Mr. James leaped at [Thomas] and began to struggle with him. During the course of this altercation, [Thomas] shot Mr. James in the chest. The victim subsequently died of his wound. [Thomas] also shot Mr. Fuller in the shoulder. Mr. Fuller survived.

(App. 684-85.)

After the robbery and shooting, the police talked with at least two eyewitnesses, Christopher Young and Fuller. Young, an acquaintance of Thomas, originally failed to

identify Thomas as one of the assailants, but, after making several inconsistent statements about the incident, did identify Thomas. He later testified that he was threatened by the police, and that he feared being arrested if he did not name someone. He also had several criminal charges pending against him when he testified on behalf of the Commonwealth at Thomas's trial.

Fuller, the surviving shooting victim, described his assailant as a black male, and was shown some 750 pictures of black males arrested for robbery, but made no identification at that time.[1] Weeks later, he was shown about 10-12 more photos, but still could not identify anyone. At that time, the detective allegedly pulled two pictures from the group and asked Fuller to take a "real good" look at them, and Fuller made a tentative identification.[2] At the pretrial hearing and at trial, Fuller testified that he would not have made the identification if the detective had not strongly suggested that the two pictures highlighted were of the perpetrators. Fuller could not make an in-court identification at the pre-trial hearing. Because no identification was made, counsel for Thomas withdrew his pre-trial suppression motion as to identification, as there was no identification to be suppressed. However, at trial, Fuller made a spontaneous in-court identification of Thomas, and counsel failed to object or move to suppress the identification. At trial, the testimony of Young and Fuller's in-court identification were the only evidence connecting Thomas to the crime.

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[1] There appears to be some confusion in the record as to whether Fuller was shown approximately 750 photographs at that time, or closer to 100 photographs. (App. 573, 489-90).

[2] The detective disputed Fuller's account of this incident, stating that Fuller picked out the pictures without his prompting.

Thomas was convicted by a jury of second-degree murder, robbery, aggravated assault, and possession of an instrument of crime, and was sentenced to imprisonment for life. Thomas's codefendant, his son Shaurn, was acquitted of all charges against him, which arose from his alleged role as the lookout.

Thomas appealed from his conviction, and the Superior Court affirmed; Thomas did not seek certification with the Pennsylvania Supreme Court. Thomas thereafter filed *pro se* for state post-conviction relief, and then retained counsel, who filed an amended petition and a supplemental petition. The post-conviction court summarily denied relief on all claims, including his ineffective assistance of counsel claim, without holding an evidentiary hearing. The Superior Court affirmed and the Pennsylvania Supreme Court denied certification.

After exhausting his state remedies to no avail, Thomas filed a petition for habeas corpus in the Eastern District of Pennsylvania, making claims of (1) ineffective assistance of counsel, based on (a) trial counsel's failure to object to an alleged *Bruton* violation,[3] and (b) counsel's failure to move to suppress an unreliable witness identification, and (2) prosecutorial misconduct in improperly bolstering the credibility

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[3] In *Bruton v. United States*, the Supreme Court held "that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of [the co-defendant's] confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." 391 U.S. 123, 126 (1968).

of certain witnesses.[4] The District Court referred the case to a Magistrate Judge, who held an evidentiary hearing. The Magistrate Judge recommended granting the habeas petition solely with respect to the ineffective assistance claim for failure to move to suppress the in-court identification and recommended denying it with respect to all other claims. The Commonwealth filed objections to the recommendation that the petition be granted, while Thomas did not file any objections. The District Court adopted the recommendation with respect to denying the specified claims, and, after conducting a *de novo* review, agreed that the petition should be granted as to the ineffective assistance claim based on the failure to move to suppress the identification for the reasons presented in its memorandum and order. The Commonwealth appeals.

II.

The Commonwealth argues that: (1) the Magistrate Judge erred in granting an evidentiary hearing and the District Court erred in relying on evidence from that hearing, as it failed to honor the presumption of correctness accorded to state court findings; (2) the District Court erred in finding that counsel's conduct was objectively unreasonable simply because a better strategy may have existed; (3) the District Court improperly placed the burden of proof on the Commonwealth to show that the evidence should not have been suppressed; and (4) Fuller's identification was cumulative, making its suppression harmless and non-prejudicial. After

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[4] Thomas also made an ineffective assistance claim in his petition based on counsel's failure to use an adverse witness' criminal history to impeach him. However, this claim was never pursued in his filings before the District Court, and he does not raise it here.

setting forth the general habeas corpus standards applicable here, we will consider the arguments in that order.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The District Court decided this case under the unreasonable application provision of the statute's first section. A state court decision is an unreasonable application under § 2254(d)(1) if the court "identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular case or if the state court either unreasonably extends a legal principle from the Supreme Court's precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Gattis v. Snyder*, 278 F.3d 222, 228 (3d Cir. 2002). "The unreasonable application test is an objective one--a federal court may

not grant habeas relief merely because it concludes that the state court applied federal law erroneously or incorrectly." *Jacobs v. Horn*, 395 F.3d 92, 100 (3d Cir. 2005).

"AEDPA's deferential standards of review do not apply 'unless it is clear from the face of the state court decision that the merits of the petitioner's constitutional claims were examined in light of federal law as established by the Supreme Court of the United States.'" *Id.* (quoting *Everett v. Beard*, 290 F.3d 500, 508 (3d Cir. 2002)). In other cases, "federal habeas courts apply pre-AEDPA standards of review." *Id.* Under those standards, "federal habeas courts conduct[] a de novo review over pure legal questions and mixed questions of law and fact." *Id.*

A. The Presumption of Correctness and the Federal Evidentiary Hearing

According to the habeas corpus statute:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

As noted, the Commonwealth contends that the presumption of correctness from § 2254(e)(1) was ignored by the Magistrate Judge in granting the evidentiary hearing, and that evidence from this hearing should not have been

considered by the District Court. Although the Commonwealth rests its arguments entirely on § 2254(e)(1), the propriety of the grant of an evidentiary hearing is the province of § 2254(e)(2). That section proscribes a federal court from holding an evidentiary hearing "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings." § 2254(e)(2).

By its terms § 2254(e)(2) "applies only to prisoners who have 'failed to develop the factual basis of a claim in State court proceedings.'" *Williams v. Taylor*, 529 U.S. 420, 430 (2000). Our first inquiry is "whether the factual basis was indeed developed in state court, a question susceptible, in the normal course, of a simple yes or no answer." *Id.* at 431. The Commonwealth appears to be arguing that the factual basis for Thomas's claim was in fact developed in state court because the subjective intent and motivation of counsel in taking (or not taking) actions during trial, that are later challenged as ineffective assistance, are irrelevant to the *Strickland* inquiry.[5] However, as we discuss in the next section, the intent or motivation of counsel is relevant to the *Strickland* inquiry, and therefore the factual basis for the ineffective assistance claim here was not developed in the Pennsylvania proceedings. As we observed in *Marshall v. Hendricks*, in the course of declining to defer to a state court "strategy" determination similar to the one reached here:

> We conclude that *Strickland* requires an analysis based on a complete record. The reviewing court's reasoning under the first

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[5] In other words, the Commonwealth asserts that the case could have been resolved entirely with reference to the state court record, as done by the Commonwealth PCR courts, obviating any need to hold an evidentiary hearing.

> prong needs to be made with an understanding of counsel's thought process, . . . so that a conclusion whether counsel was ineffective can be made based on facts of record, rather than on assumptions.

307 F.3d 36, 115 (3d Cir. 2002).

The "failure" inquiry does not end once it is determined that the factual basis of a claim had not been developed in state court. Because "[i]n its customary and preferred sense, 'fail' connotes some omission, fault, or negligence on the part of the person who has failed to do something," "a person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance." *Williams*, 529 U.S. at 431-32. Accordingly, "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at 432. Here, Thomas requested an evidentiary hearing before the Commonwealth PCR court to develop the record with respect to counsel 's choice not to object to or file a motion to suppress the identification. The hearing was denied, and therefore Thomas is not at fault for failing to develop the factual basis for his claim. Section 2254(e)(2) is thus inapplicable. *See, e.g., Mason v. Mitchell*, 320 F.3d 604, 621 n.6 (6th Cir. 2003). Accordingly, we find no fault in the Magistrate Judge's holding of a hearing.

B. <u>The Ineffective Assistance Claim</u>

In *Strickland v. Washington*, the Supreme Court held:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. 668, 687 (1984). Accordingly, we must undertake the familiar two-step inquiry by considering (1) whether counsel 's performance was so deficient as to constitute a denial of counsel and (2) whether the alleged errors prejudiced Thomas by depriving of a fair trial.

1. *Deficient Performance*

With respect to the deficient performance prong, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. However, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the

circumstances, the challenged action might be considered sound trial strategy." *Id.* (quotation omitted). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."[6] *Id.* at 690.

To overcome the *Strickland* presumption that, under the circumstances, a challenged action might be considered sound trial strategy, a habeas petitioner must show either that: (1) the suggested strategy (even if sound) was not in fact motivating counsel or, (2) that the actions could never be considered part of a sound strategy. It is the former showing that we are presented with here.

Our review reveals a tiered structure with respect to *Strickland*'s strategic presumptions. At first, the presumption is that counsel's conduct might have been part of a sound strategy. The defendant can rebut this "weak" presumption by showing either that the conduct was not, in fact, part of a strategy[7] or by showing that the strategy employed was

[6] We have previously considered the subjective and objective facets of the *Strickland* standard. *Compare Marshall v. Hendricks*, 307 F.3d 36, 105 (3d Cir. 2002) ("[T]he task of the reviewing court is to take each of the claimed failures and measure them against counsel's stated rationale to determine whether the choices were objectively unreasonable."), *with Buehl v. Vaughn*, 166 F.3d 163, 176 (3d Cir. 1999) (finding that the strategic presumption could not be overcome because "[a]n objection to [the] brief portions of testimony might have simply highlighted the statements for the jury").

[7] We believe that an inquiry into whether counsel actually had some strategy is permissible. *Cf. United States v. McCoy*, 410 F.3d 124, 135 (3d Cir. 2005) (stating, in a 28 U.S.C. § 2255 case,

(Continued)

unsound. *See, e.g., Rice v. Marshall*, 816 F.2d 1126, 1132 (6th Cir. 1987). In cases in which the record does not explicitly disclose trial counsel's actual strategy or lack thereof (either due to lack of diligence on the part of the petitioner or due to the unavailability of counsel), the presumption may only be rebutted through a showing that no sound strategy posited by the Commonwealth could have supported the conduct.[8] *See Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (noting that the strategic presumption "has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive'") (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)). However, if the Commonwealth can show that counsel actually pursued an *informed* strategy (one decided upon after a thorough investigation of the relevant law and facts), the "weak" presumption becomes a "strong" presumption, which is "virtually unchallengeable." *See Strickland*, 466 U.S. at 690; *see also Bullock v. Carver*, 297 F.3d 1036, 1046-48 (10th Cir. 2002) (discussing the *Strickland* presumptions).

(Continued)

that "[w]ithout the opportunity to evaluate the rationale given by trial counsel, the issue of possible ineffectiveness cannot be conclusively determined."). Otherwise, incompetency of defense counsel could be rewarded by ingenuity on the part of a State's attorneys in supplying hypothetical strategies to explain defense counsel's uninformed prejudicial oversights.

[8] To be clear, in opposing a petitioner's attempt to disprove the existence of a possible sound strategy, it is entirely proper for the Commonwealth to engage in record-based speculation as to what counsel's strategy might have been. *See Buehl*, 166 F.3d at 176.

Here, Thomas rebutted the weak presumption that counsel's actions might have been strategic by offering testimony from counsel that his "actions," in failing to move to suppress or object, were not in fact part of a strategy. Indeed, counsel testified at the federal evidentiary hearing that he did not see the need to go forward with his already submitted suppression motion once Fuller recanted his identification in the pre-trial hearing and that he believed he was not permitted to object or move to suppress the identification once it had already been made.[9] We note also that the purported strategy--allowing the identification in order to cross-examine Fuller about the improper police efforts in obtaining the identification--does not even appear to be reasonable. Even if the identification was never made or was suppressed, counsel was still free to question Fuller about the police tactics in procuring his since-disavowed identification during the photo array. *See Rodriguez v. Young*, 906 F.2d 1153, 1160 (7th Cir. 1990) (finding that failure to move to suppress an identification was objectively unreasonable, and noting that the petitioner's "defense could not have been compromised or hurt by a motion to suppress" as "cross examination was still available"). In any case, because Thomas has shown that counsel was not acting pursuant to an informed strategy, the weak presumption that counsel's actions might be part of a strategy was properly rebutted.

Of course, overcoming the strategic presumption does not, in itself, entitle Thomas to relief. It merely gives him the opportunity to show that counsel's conduct fell below

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[9] The Pennsylvania Rules of Criminal Procedure allow for motions to suppress to be made after the commencement of trial if "the opportunity did not previously exist, or the interests of justice otherwise require." Pa. R. Crim. P. 581(B) (formerly Rule 323).

objective standards of attorney conduct.[10] "*Strickland* teaches that a court deciding any ineffectiveness claim must 'determine whether, *in light of all the circumstances*, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.'" *Jacobs*, 395 F.3d at 106 (quoting *Strickland*, 466 U.S. at 690).

Courts have routinely declared assistance ineffective when "the record reveals that counsel failed to make a crucial objection or to present a strong defense solely because counsel was unfamiliar with clearly settled legal principles." 3 Wayne LaFave et al., Criminal Procedure § 11.10(c), at 721 (2d ed. 1999); *see also Cofske v. United States*, 290 F.3d 437, 443 (1st Cir. 2002) ("[C]ourts tend to be somewhat less forgiving where counsel altogether overlooks a possible objection or opportunity.") (citing LaFave, *supra*, § 11.10(c), at 714-15). "[T]he defendant is most likely to establish

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[10] We note that evidentiary hearings regarding counsel's strategy will not be required in all cases, as the objective reasonableness inquiry may obviate the need for such a hearing. Similar to instances in which a court disposes of an ineffective assistance claim by analyzing the prejudice prong without considering whether counsel's performance was deficient, it is appropriate for a court to dispose of a case in which conduct is objectively reasonable without considering counsel's strategy . *See Strickland*, 466 U.S. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). Put differently, no hearings as to counsel's strategy are necessary in cases in which the conduct challenged is objectively reasonable, as courts can simply reject the claims on reasonableness grounds. *Cf. McCoy*, 410 F.3d at 134 (discussing whether a hearing is necessary in the context of the federal custody habeas section, 28 U.S.C. § 2255).

incompetency where counsel's alleged errors of omission or commission are attributable to a lack of diligence rather than an exercise of judgment." LaFave, *supra*, § 11.10(c), at 714.

Our review of whether counsel's conduct was objectively unreasonable is *de novo*, as the Pennsylvania courts never reached this issue, having denied the claim on strategy grounds. Here, counsel decided to withdraw his motion to suppress an identification by Fuller after Fuller failed to identify Thomas at the pre-trial hearing. At trial, when Fuller did in fact make an identification, counsel did not object to the identification or move to suppress it because he erroneously believed that he could not take either of those actions once the identification had been made. We need not decide whether the withdrawal of the original suppression motion itself constitutes objectively unreasonable behavior. Instead, we agree with the District Court that failure to move to suppress or otherwise object to an in-court identification by the prosecution's central witness, when there are compelling grounds to do so, is not objectively reasonable representation, absent some informed strategy.[11] *See Morrison v. Kimmelman* (*Morrison*), 752 F.2d 918, 922 (3d Cir. 1985) (suggesting that "proper norms of advocacy" required a "timely [motion] to suppress" where there was a valid basis for suppression), *aff'd on other grounds* 477 U.S. 365 (1986) (*Kimmelman*); *Rodriguez*, 906 F.2d at 1160 ("[W]e think it is obvious that in a case like this one--with no murder weapon

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[11] Although the Commonwealth suggests that motions to suppress made after presentation of evidence are rare, they are certainly permitted. *See, e.g., Commonwealth v. Long*, 753 A.2d 272, 279 (Pa. Super. Ct. 2000) ("[A] motion to suppress evidence must be made pretrial, unless the opportunity did not previously exist, or the interests of justice otherwise require.") (internal quotation omitted).

in evidence and only one witness naming the defendant as the murderer--even the most withering cross examination could not substitute for suppression."); *see also Cossel v. Miller*, 229 F.3d 649, 654 (7th Cir. 2000). Of course, it would not be objectively unreasonable for counsel to decline to make a motion to suppress during a trial when either the motion is plainly without merit or the evidence is of little probative value. Here, however, that is not the case, as the motion was colorable, given Fuller's failure to make an identification at the pre-trial hearing and his testimony regarding the photo arrays and the lack of any evidence other than Young's testimony connecting Thomas to the shooting.

2. *Prejudice*

The prejudice component requires Thomas to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. He "need not show that counsel's deficient performance 'more likely than not altered the outcome in the case'--rather, he must show only 'a probability sufficient to undermine confidence in the outcome.'" *Jacobs*, 395 F.3d at 105 (citing *Strickland*, 466 U.S. at 693-94). "This standard is not a stringent one." *Id.* (internal quotations omitted). Although *Strickland* does not set a high bar with respect to the prejudice inquiry, Thomas must show that he would likely have prevailed on the suppression motion and that, having prevailed, there is a reasonable likelihood that he would not have been convicted. *See Morrison*, 752 F.2d at 922; *see also Belmontes v. Brown*, 414 F.3d 1094, 1121 (9th Cir. 2005) (requiring a "reasonable probability that a motion to suppress would have succeeded and that the suppression . . . would have led to a different out-come at the trial") (citing *Kimmelman*, 477 U.S. at 375); *Howard v. Bouchard*, 405 F.3d 459, 481 (6th Cir. 2005)

("[Petitioner] cannot establish prejudice under *Strickland*, because he cannot show that a motion to exclude [the] identifications would have succeeded.").

The District Court found, however, that counsel was ineffective for failing to move to suppress or object to the identification, and then found prejudice, stating that "[f]ailure to object to an unreliable eyewitness identification is manifestly prejudicial where, as here, there was no physical evidence linking Petitioner to the crime and the only other eyewitness was also unreliable." App. at 11. That analysis skips a step, in assuming that the objection would have likely resulted in suppression of the identification. Indeed, were it likely that the suppression motion would have been denied (or the objection overruled), then Thomas could not show prejudice.[12] The Magistrate Judge, on the other hand, did consider the merits of the motion. As with objective reasonableness, we review prejudice *de novo*, as it is a legal issue never considered in the Pennsylvania court proceedings.

In order to determine whether a motion to suppress would have been granted, we must determine (1) whether the identification process was unduly suggestive and, if so, (2) whether the totality of the circumstances nonetheless renders the identification reliable. *See Neil v. Biggers*, 409 U.S. 188 (1972). As to the first inquiry, "convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside only if the photographic identification was so impermissibly suggestive as to give rise

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[12] Relatedly, as it is the petitioner's burden to show prejudice, it is his responsibility to develop a record under which the merits of the suppression motion can be determined. Availability of a hearing for such purposes should be determined under the standards discussed in Part II.A.

to a very substantial likelihood of . . . misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968). The determination of whether the circumstances give rise to undue suggestiveness must be made on a case-by-case basis, considering the particular conduct in each case. *Id.* Here, Fuller testified that the detective insisted that he look "real good" at the photograph of Thomas after failing to get an identification from Fuller on several prior occasions. The Commonwealth notes that the detective's trial testimony conflicted directly with Fuller's account of the identification. However, the Commonwealth declined to develop the record further before the Magistrate Judge, despite the opportunity to do so. Accordingly, the Commonwealth did not establish by a preponderance of the evidence that the photo array was not improperly suggestive. At the hearing before the Magistrate, the relevant issue was whether or not a motion to suppress would have been successful in the state court if Thomas's trial counsel had made such a motion. If trial counsel had filed a suppression motion, the burden would have been on the Commonwealth to establish that Fuller's identification was not the result of undue suggestiveness. *See* Pa. R. Crim. P. 581(H) ("The Commonwealth shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of defendant's rights."); *Commonwealth v. Culp*, 548 A.2d 578, 581 (Pa. Super. 1988). Because the Commonwealth did not carry its burden, the Magistrate did not err in accepting Thomas's position.

The Supreme Court has made clear, however, that undue suggestiveness alone does not require suppression; rather, this Court must consider "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Biggers*, 409 U.S. at 199. In *Biggers*, the Supreme Court held that

> the factors to be considered in evaluating the likelihood of misidentification include [(1)] the opportunity of the witness to view the criminal at the time of the crime, [(2)] the witness' degree of attention, [(3)] the accuracy of the witness' prior description of the criminal, [(4)] the level of certainty demonstrated by the witness at the confrontation, and [(5)] the length of time between the crime and the confrontation.

Id. at 199-200. Here, both the District Court and the Magistrate Judge conducted an inquiry into these factors and concluded that there was a substantial likelihood of irreparable misidentification.[13] (App. 9-10, 38-45.) We agree. Under the first two factors, although Fuller did have an opportunity to see his assailant, he testified that he was facing the assailant only for a short time and was concentrating first on his chess game and then on attempting to flee. The third factor does weigh in favor of reliability, as Fuller's initial description of the shooter is an accurate description of Thomas. However, the fourth factor strongly negates any reliability evidenced by the third factor: Fuller expressly disavowed his identification at the pre-trial hearing, and his certainty at trial cannot be reconciled with his testimony and the earlier hearing. As to the last factor, a significant amount of time passed between the shooting and the in-court identification, with Fuller failing to identify an assailant in the intervening period, including during the time immediately after the incident. Considering each of the factors, we find that the identification was the product of unduly suggestive

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[13] Although the Magistrate Judge relied on cases other than *Biggers* to derive the factors, he undertook the same analysis.

photographic lineups and was unreliable given the totality of the circumstances.

Assuming that the identification would likely have been suppressed we believe that there is a reasonable likelihood that the result of the trial would have been different. As noted, this is not a stringent standard. Once Fuller's identification is excluded, the only remaining evidence inculpating Thomas is the testimony of Young. That testimony was very questionable; indeed, the prosecution had to impeach him with his own prior statements at the outset of his testimony. He also stated his apprehension towards police officers and stated that he was threatened before identifying Thomas. Importantly, Thomas 's co-defendant was acquitted by the jury notwithstanding Young's implication of him in the criminal activity. We conclude that counsel's error in failing to move to suppress or object to the identification at trial clearly undermined the reliability of the verdict.

III.

For the foregoing reasons, we affirm the District Court's grant of Thomas's petition for habeas corpus.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAYTON THOMAS	:	
	:	**CIVIL ACTION**
v.	:	
	:	**NO. 02-4778**
BEN VARNER, *et al.*	:	

MEMORANDUM AND ORDER

Kauffman, J. **Filed: May 28, 2004**
May 27, 2004 **Entered: June 1, 2004**

Before the Court is the Petition of Clayton Thomas ("Petitioner") for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition").[1] On July 30, 2002, the Petition was submitted to Magistrate Judge Charles B. Smith for a Report and Recommendation ("R&R"). On September 26, 2003, following an evidentiary hearing, Magistrate Judge Smith recommended that the Court grant the Petition with respect to Count II, but deny it with respect to Counts I and III.[2] *See* R&R at 33; Memorandum and Order of Magistrate

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[1] Originally assigned to Judge Waldman, this matter was reassigned on April 4, 2003.

[2] In Count II, Petitioner alleges ineffective assistance of counsel for failure to object to the in-court identification of Petitioner by Commonwealth witness Peter Fuller, which Petitioner claims was the product of an unconstitutionally suggestive photo array.

Magistrate Judge Smith treated Count IV of the Petition as withdrawn. No objection was raised to this determination.

Judge Smith, June 10, 2003 at 20, 38. On October 22, 2003, Respondents filed Objections to the recommendation that the Petition be granted with respect to Count II ("Objections").[3] No objection has been asserted by Petitioner to the recommendation that the Petition be denied with respect to Counts I and III. Accordingly, the Court will adopt the R&R and deny the Petition with respect to those claims.

The Court has reviewed the R&R *de novo* with respect to Count II, and agrees with Magistrate Judge Smith that the Petition should be granted. *See* 28 U.S.C. § 636(b).

I. Background

The Superior Court provided a concise summary of the underlying case:

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[3] Respondents object that Magistrate Judge Smith:

1. Ignored the presumption of correctness given to state court decisions and improperly refused to defer to the state court's finding that trial counsel followed a reasonable trial strategy;

2. Did not defer properly to the state court's legal determinations;

3. Misapplied the standards for ineffective assistance of counsel;

4. Erroneously placed the burden of proof on Respondents; and

5. Misapplied the "totality of circumstances" test.

> The charges stemmed from the robbery of a speakeasy located in the City of Philadelphia. Accompanied by a person who acted as look-out, [Petitioner] entered the speakeasy brandishing a firearm and ordered the occupants to the floor. The proprietor of the establishment, Harry James, had been playing chess with a customer, Peter Fuller. Mr. James was fetching a beer for another customer when [Petitioner] arrived. Instead of complying with [Petitioner's] order, Mr. James leaped at [Petitioner] and began to struggle with him. During the course of this altercation, [Petitioner] shot Mr. James in the chest. The victim subsequently died of his wound. [Petitioner] also shot Mr. Fuller in the shoulder. Mr. Fuller survived.

Memorandum Opinion of the Superior Court of Pennsylvania on Appeal from the Denial of Relief Pursuant to the Post-Conviction Relief Act, No. 2134 EDA 2000, Dec. 12, 2001 ("Super. Ct. PCRA App."), pp. 1-2.

Following a jury trial in the Court of Common Pleas of Philadelphia County, Petitioner was convicted on May 31, 1994 of second degree murder, robbery, aggravated assault and possession of an instrument of crime. He was sentenced to life imprisonment.[4] Petitioner's direct and PCRA appeals were exhausted on July 9, 2002, when the Pennsylvania Supreme Court denied his request for allowance of appeal.

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[4] Petitioner's co-defendant, his son Shaurn Thomas, was acquitted of all charges.

Petitioner alleges that the critical eyewitness identification by Peter Fuller was tainted by an unconstitutionally suggestive photo array and that his trial counsel was ineffective for failing to object to it. Fuller has testified that he was first shown approximately one hundred photos, but could *not* identify the shooter. Trial Transcript, May 25, 1994 ("T.T. 5/25/94") at 136-138. He was then shown more photos, but still could not identify the shooter. *Id.* at 138. Several weeks later, Fuller was shown approximately ten or twelve additional photos, but he still could *not* identify the shooter. *Id.* Finally, a detective took the photos of Petitioner and his co-defendant out of the group of twelve and told Fuller to look at them "real good." Transcript of Preliminary Hearing, 3/25/93 ("P.T.") at 24-5. As the Superior Court noted, Fuller testified that if the detective had not "strongly suggested that [Petitioner and his co-defendant] were guilty of the crimes," he "would never have identified either [Petitioner] or his co-defendant."[5] Super. Ct. PCRA App. at 20-21; *see* R&R at 21; P.T. at 44, T.T. 5/25/94 at 137-146.[6] Because Fuller testified to these events at the preliminary hearing, trial counsel was aware of this testimony prior to trial. P.T. at 28, 43-45.

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[5] The Superior Court concluded that defense counsel failed to object to the identification testimony because of a reasonable trial strategy. That factual finding was not supported by the record. Indeed, in an evidentiary hearing before Magistrate Judge Smith, trial counsel testified that he failed to object to the identification testimony not because of any trial strategy, but only because he believed he could not object to the in-court identification once it had been made. *See infra* pp. 6-8.

[6] Respondents dispute that the detective selected the two photographs for Fuller or suggested that the co-defendants were guilty.

II. Legal Standards

A. Legal Standard - Habeas Corpus

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Because this is not an appellate review of the state court decision, this Court must defer to the findings of fact reached by the state court whenever they are supported by probative evidence. *Wright v. West*, 505 U.S. 277, 302 (1992); *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Riley v. Taylor*, 277 F.3d 261, 285 (3d Cir. 2001). "[A] state court's finding that counsel had a trial strategy is a finding of fact to which the habeas court must afford the presumption of correctness if that factual finding is supported by the record." *Berryman v. Morton*, 100 F.3d 1089, 1095 (3d Cir. 1996).

B. Ineffective Assistance of Counsel

A petitioner claiming ineffective assistance of counsel must demonstrate (1) that counsel's performance was deficient, i.e. that it fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced his client. *Strickland v. Washington*, 466 U.S. 668, 689-92. In examining the question of deficiency,

"[j]udicial scrutiny of an attorney's performance must be highly deferential." *Id.* at 689.

A fair assessment of attorney performance requires that every effort be

> made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered *sound trial strategy*.'

Id. (Emphasis added).

"[I]n considering claims of ineffective assistance of counsel, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987), *citing U.S. v. Cronic*, 466 U.S. 648, 665 n.38 (1984). "To establish deficient performance, a petitioner must demonstrate that counsel's representation fell below an objective standard for reasonableness" in the context of "prevailing professional norms." *Wiggins v. Smith*, 123 S. Ct. 2527, 2535-36 (2003) (internal quotations omitted).

Furthermore, a conviction should not be overturned, even if counsel was deficient, unless "there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

C. Tainted Identification

The admissibility of a challenged identification is reviewed under a two-part test: (1) the court must decide whether the identification procedure was unnecessarily suggestive and, if so, (2) whether under the "totality of the circumstances" it is nonetheless reliable. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). Respondents do not dispute that the photo array, if it was conducted as Fuller claims, was unconstitutionally suggestive. *See Simmons v. U.S.*, 390 U.S. 377, 383 (1968). However, "[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 384.

Five factors are relevant to the reliability of the identification: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Neil*, 409 U.S. at 198.

III. Analysis

A. The Failure to Object

Normally, a motion to suppress must be made before trial. Pa. R. Crim. P. 581(B). Defense counsel had originally filed a pre-trial motion to suppress Fuller's testimony. However, at the preliminary hearing, after Fuller took twenty-five seconds to look at Petitioner, he was unable to identify Petitioner as the shooter. Accordingly, there being no identification to suppress, defense counsel withdrew the motion to suppress on the morning of trial. Transcript of the Evidentiary Hearing before Magistrate Judge Smith, August 27, 2003 ("T.E. 8/27/03") at 12-13. During his trial testimony, however, Fuller identified Petitioner as the shooter for the first time. T.T. 5/25/94 at 129. Petitioner's counsel failed to object to this testimony or to move for a mistrial. *Id.* at 131-146.

Based on its review of the trial transcript, the Superior Court concluded that defense counsel failed to object to the Fuller identification testimony because he had a reasonable trial strategy of waiting to attack the identification on cross-examination. Super. Ct. PCRA App. at 21. This Court is bound by the Superior Court's findings of fact only if they are based on the record. *Wiggins*, 123 S. Ct. , at 2539; *Marshall v. Hendricks*, 307 F.3d 36, 115 (3d Cir. 2002) ("The reviewing court's reasoning under the first prong needs to be made with an understanding of counsel's thought process. . . so that a conclusion. . . can be made based on facts of record, rather than on assumptions"). This Court need not defer to the Superior Court's conclusion if it was merely speculating as to the existence of a trial strategy. *Marshall*, 307 F.3d at 115; *Berryman*, 100 F.3d at 1095. The Third Circuit has recommended an evidentiary hearing as a way of avoiding

"post-hoc rationalization of counsel's conduct." *Marshall*, 307 F.3d at 111, 114-15; *Wiggins* 123 S. Ct. at 2539.

"The Superior Court's ruling in this matter was based on nothing more than speculation as to counsel's intentions. Under the clear mandate of *Strickland*, such speculation cannot be given unquestioned deference by this Court." R&R at 10. Following the Third Circuit's recommendation in *Marshall*, Magistrate Judge Smith held an evidentiary hearing at which trial counsel testified that he failed to object to the in-court identification *not* because of trial strategy, but rather because he believed that he could not do so once it had been made.[7] T.E. 8/27/03 at 15. Accordingly, the Court will not defer to the Superior Court's incorrect conclusion. Counsel was deficient for failing to request a mistrial or to move to suppress Fuller's in-court identification.

B. The Photo Array

Respondents argue that even if the Court accepts Fuller's version of events, the in-court identification was reliable under the totality of the circumstances. Magistrate Judge Smith disagreed, as does this Court. Because the Superior Court found that the failure to object was the result of a trial strategy, it did not reach the question of whether the

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[7] This belief was erroneous. The Pennsylvania Rules of Criminal Procedure clearly provide for an objection or a motion to strike to be made after the admission of a statement where "the opportunity did not previously exist" or "the interests of justice otherwise require." Pa. R. Crim. P. 581(B). Significantly, Fuller had never identified Petitioner as the shooter before trial. Indeed, he repeatedly maintained that he could not do so. Thus, no opportunity previously existed to press an objection to Fuller's identification testimony.

identification was reliable. Super. Ct. PCRA App. at 20-22. Accordingly, this Court reviews the questions of suggestiveness and reliability *de novo*. *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001).

With respect to the first and second *Neil* factors -- (1) the opportunity of the witness to view the assailant and (2) his degree of attention (see *supra*, [App. p.33]) -- the Court agrees with Magistrate Judge Smith that Fuller's attention was not on the assailant, but rather was initially focused on his chess game and later focused on flight. R&R at 26-7; T.T. 3/25/94 at 119-122. Accordingly, these factors weigh in favor of suppression. Respondents submit that Fuller's prior description of the assailant and certainty at the time of trial (the third and fourth *Neil* factors) weigh in their favor. However, the reliability of Fuller's description is undercut by the fact that he repeatedly failed to identify Petitioner in photo arrays before trial and could not identify him at the pre-trial hearing.[8] The fifth *Neil* factor, the time between identification and the incident, weighs in favor of suppression because, at the times most proximate to the incident, Fuller was unable to identify Petitioner.[9] Finally, Fuller was shot during the altercation, which could have impacted both upon the

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[8] Fuller's first confrontation with Petitioner after viewing the photo arrays was at the preliminary hearing, where he could *not* identify Petitioner.

[9] The cumulative effect of seeing Petitioner in suggestive settings such as the allegedly unconstitutional photo array and the preliminary hearing may have contributed to Fuller's identification testimony at trial. Furthermore, Fuller met with the prosecutor to prepare for his trial testimony subsequent to the preliminary hearing, which may also have impacted on his trial testimony. *See*

(Continued)

quality of his perceptions and upon his desire to see someone convicted of the crime. Thus, the Court finds that, if Fuller's version of events is true, upon consideration of the totality of the circumstances, the photo array was so suggestive as to give rise to a substantial likelihood of irreparable misidentification and, accordingly, that the in-court identification should have been objected to and suppressed.[10]

Respondents next argue that this Court cannot find that the photo array actually was suggestive. Objections at 40; *see* R&R at 22, *citing* T.T. 5/25/94 at 216-220, 223. At trial, the detective who performed the photo array denied picking out Petitioner's photo or suggesting to Fuller that Petitioner was guilty. R&R at 22, *citing* T.T. 5/25/94 at 216-220, 223. The Court cannot, and does not, make a factual finding regarding the circumstances of the photo array. However, had Petitioner's counsel objected at trial, the Commonwealth would have borne the burden of "establishing that the challenged evidence was not obtained in violation of the defendant's rights." Pa. R. Crim. P. 581(H); *Commonwealth ex rel. Butler v. Rundle*, 239 A.2d 426 (Pa. 1968) (both the burden of production and of persuasion are on the Commonwealth). Given Fuller's sworn testimony at the preliminary hearing, an objection would

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(Continued)

T.T. 5/25/94 at 135. At the times closest to the incident, when his exposure to suggestive influences was more limited, Fuller was *unable to identify Petitioner*.

[10] The appropriate remedy for an unconstitutionally suggestive pre-trial identification is exclusion of the in-court identification at trial. *Manson v. Brathwaite*, 432 U.S. 108 (1977); *Simmons*, 390 U.S. 377.

have had evidentiary support.[11] Accordingly, Petitioner has met his burden of showing that his trial counsel was deficient for failing to put the Commonwealth to its proof, thereby depriving him of the opportunity to challenge the allegedly suggestive photo array.

C. Prejudice

Failure to object to an unreliable eyewitness identification is manifestly prejudicial where, as here, there was no physical evidence linking Petitioner to the crime and the only other eyewitness was also unreliable. *See Buehl v. Vaughn*, 166 F.3d 163, 173 (3d Cir. 1999) (a court must consider the weight of the evidence against Petitioner at trial in determining the prejudice resulting from an attorney's deficient performance). Had Fuller's identification been excluded by the trial court, the only link between Petitioner and the crime would have been the testimony of Christopher Young, a second eyewitness who identified Petitioner as the shooter. However, Young's trial testimony was unreliable.[12] Despite the fact that he knew Petitioner before the shooting, Young expressly denied knowing the shooter in his first statement to police. T.T. 5/25/94, 69-70. He testified at trial that he

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[11] At the time of Fuller's trial testimony, the Commonwealth's other eyewitness, Christopher Young, had already described an identically suggestive photo array given to him. T.T. 5/25/94 at 98-102. Furthermore, in its closing argument, the Commonwealth referred to Fuller as a "certified truth teller" and acknowledged that he had "no reason to lie." T.T. 5/26/94 at 104.

[12] Even the Commonwealth challenged Young's trial testimony when it threatened him with prosecution for perjury and impeached him with prior inconsistent statements. T.T. 5/25/94 at 30, 159, 168, 170-190.

identified Petitioner only after police threatened to arrest him for the crime if he did not do so. *Id.* at 29, 30, 37, 96. Young also testified that he was shown a photo array that was as suggestive as the one shown to Fuller. *See supra*, n.11. Upon consideration of the weight of the remaining evidence, the Court's confidence in the jury's verdict is undermined.

IV. Conclusion

Petitioner's trial counsel failed to object to the in-court eyewitness identification of his client because he erroneously believed that he was not permitted to do so. This decision indisputably was *not* part of a "sound trial strategy" and deprived Petitioner of his right to challenge the allegedly suggestive photo array. The identification in question was the fundamental pillar on which the Commonwealth's case rested and counsel's error fatally undermines the reliability of the verdict. Accordingly, a writ of habeas corpus shall issue directing that Petitioner be re-tried within one hundred twenty (120) days or be released.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAYTON THOMAS	:	
	:	**CIVIL ACTION**
v.	:	
	:	**NO. 02-4778**
BEN VARNER, *et al.*	:	

ORDER

Filed: May 28, 2004

AND NOW, this 27th day of May, 2004, upon consideration of the Petition for Writ of Habeas Corpus (docket no. 9) and the responsive filings, it is **ORDERED** that:

1. The Report and Recommendation of Magistrate Judge Charles B. Smith of September 26, 2003 is **APPROVED** and **ADOPTED**.

2. Count II of the Petition is **GRANTED** and Petitioner's conviction is **VACATED**.

3. Counts I, III, and IV of the Petition are **DENIED** with prejudice.

4. The execution of the writ of habeas corpus is **STAYED** for 120 days from the date of this Order, during which period the Commonwealth of Pennsylvania may commence a new trial.

5. If the Commonwealth of Pennsylvania does not commence a new trial within 120 days from the date of this Order, Petitioner shall be released from custody.

6. Pursuant to 28 U.S.C. § 2253, a certificate of appealability is issued.

7. If an appeal to the United States Court of Appeals for the Third Circuit is filed in a timely fashion, this Order will be stayed pending disposition of that appeal pursuant to Local Rule of Civil Procedure 9.4(12).

BY THE COURT:

/s/
BRUCE W. KAUFFMAN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAYTON THOMAS,	:	CIVIL ACTION
Petitioner	:	
	:	
VS.	:	
	:	
BEN VARNER,	:	
AND	:	
THE DISTRICT ATTORNEY	:	
OF THE COUNTY OF	:	
PHILADELPHIA,	:	
AND	:	
THE ATTORNEY GENERAL	:	
OF THE STATE OF PENN-	:	
SYLVANIA,	:	
Respondents	:	NO. 02-4778

REPORT AND RECOMMENDATION

ENTERED: September 29, 2003

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

Currently pending before the Court is a Petition for Writ of Habeas Corpus filed, pursuant to 28 U.S.C. § 2254, by a petitioner incarcerated in the State Correctional Institution at Smithfield, Pennsylvania. After an initial review of the petition, this Court opted to grant an evidentiary hearing on plaintiff's claim of trial counsel ineffectiveness for failure to seek exclusion of a tainted witness identification. Having conducted that hearing and having considered the testimony of several pertinent witnesses, the Court now recommends

that the petition be granted and that petitioner be given a new trial within 120 days of the date that this Recommendation is adopted.

I. PROCEDURAL HISTORY[1]

Following a jury trial presided over by the Honorable Jane Cutler Greenspan of the Philadelphia Court of Common Pleas, petitioner was convicted, on May 31, 1994, of second degree murder, robbery, aggravated assault and possession of an instrument of crime. According to the Pennsylvania Superior Court,

> The charges stemmed from the robbery of a speakeasy located in the City of Philadelphia. Accompanied by a person who acted as lookout, [petitioner] entered the speakeasy brandishing a firearm and ordered the occupants to the floor. The proprietor of the establishment, Harry James, had been playing chess with a customer, Peter Fuller. Mr. James was fetching a beer for another customer when [petitioner] arrived. Instead of complying with [petitioner's] order, Mr. James leaped at [petitioner] and began to struggle with him. During the course of this altercation, [petitioner] shot Mr. James in the chest. The victim subsequently died of his wound. [Petitioner] also shot Mr. Fuller in the shoulder. Mr. Fuller survived.

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[1] Much of the procedural history is taken verbatim from the initial Memorandum and Order filed on June 10, 2003, which we incorporate by reference into this opinion.

Superior Court Opinion (2000), pp. 1-2. After the convictions, Judge Greenspan sentenced petitioner to a term of life imprisonment. Petitioner's co-defendant and son, Shaurn Thomas, was acquitted of all charges. Although trial counsel failed to file a timely notice of appeal, petitioner's direct appeal rights were reinstated on October 28, 1996, at which time petitioner appealed to the Pennsylvania Superior Court. By way of memorandum opinion, issued May 5, 1998, the Superior Court affirmed the judgment of sentence. Petitioner did not seek allowance of appeal from the Pennsylvania Supreme Court.

On April 6, 1999, petitioner filed a *pro se* petition pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541, *et seq*. Thereafter, petitioner retained counsel, who filed both an amended and a supplemental petition. Without conducting an evidentiary hearing, the PCRA court summarily denied the petitions on June 27, 2000. The Pennsylvania Superior Court affirmed on December 12, 2001, adopting, in part, some of the reasoning of the PCRA court. On July 9, 2002, the Pennsylvania Supreme Court denied petitioner's request for allowance of appeal.

Petitioner filed the instant Petition for Writ of Habeas Corpus on July 18, 2002, raising the following issues for review:

1. Ineffective assistance of trial counsel for failure to object to the introduction of his co-defendant's statements which constituted a violation of his Sixth Amendment right to confrontation as set forth in *Bruton v. United States*,

291 U.S. 123 (1968), or to otherwise request a cautionary instruction;

2. Ineffective assistance of trial counsel for failure to move to suppress a witness identification that was both impermissibly suggestive and constitutionally unreliable;

3. Prosecutorial misconduct for improperly attempting to bolster the credibility of central witnesses Christopher Young and Detective Piree in violation of petitioner's Fifth and Fourteenth Amendment rights to due process.[2]

Upon consideration of these issues, we issued a Memorandum and Order, dated June 10, 2003, finding that petitioner's first and third claims had no merit, but that his second claim warranted an evidentiary hearing. The evidentiary hearing was conducted over the course of two days, August 27, 2003 and September 10, 2003, during which time plaintiff's trial counsel, Charles Mirarchi, and plaintiff's appellate counsel, James Bruno, testified. Although the parties were also given the opportunity to present the testimony of Peter Fuller and Detective Jeffrey Piree, and although respondent brought the

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[2] In his actual habeas petition, petitioner raised a fourth claim of ineffective assistance of counsel for failing to impeach the primary adverse witness with his criminal record. Without providing any other argument, he thereafter refers to his "Memorandum of Law, to be filed." In that Memorandum of Law, he did not address this issue at all. Absent any further discussion by petitioner, we shall likewise not address this issue.

two witnesses to court on September 10, 2003, both parties ultimately chose to rest on the record as it stood at that time. In light of these proceedings, we now set forth the following legal analysis.

II. STANDARD OF REVIEW

Under the current version of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an application for writ of habeas corpus from a state court judgment bears a significant burden. Section 104 of the AEDPA imparts a presumption of correctness to the state court's determination of factual issues -- a presumption that petitioner can only rebut by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (1994). The statute also grants significant deference to legal conclusions announced by the state court, as follows:

> An application for a writ of habeas corpus on behalf of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless that adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in

> light of the evidence presented
> in the State court proceeding.

28 U.S.C. § 2254(d).

The United States Supreme Court, in the case of *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000), interpreted the standards established by the AEDPA regarding the deference to be accorded to state court legal decisions, and more clearly defined the two-part analysis set forth in the statute. *Williams*, 529 U.S. at 404-405. Under the first part of the review, the federal habeas court must determine whether the state court decision was "contrary to" the "clearly established federal law, determined by the Supreme Court of the United States." As defined by Justice O'Connor, writing for the majority of the Court on this issue, a state court decision can be contrary to Supreme Court precedent in two ways: 1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or 2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to that reached by [the Supreme Court]." *Id.* The Court explained, however, that this "contrary to" clause does not encompass the "run-of-the-mill state-court decisions" applying the correct legal rule from Supreme Court cases to the facts of the prisoner's case." *Id.* at 406.

To reach such "run-of-the-mill" cases, the Court turned to an interpretation of the "unreasonable application" clause of § 2254(d)(1). It found that a state court decision can involve an unreasonable application of Supreme Court precedent: 1) "if the state court identifies the correct governing legal rule from the Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or 2) "if

the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context should apply." *Williams*, 529 U.S. at 407-408. The Court specified, however, that under this clause, "a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly-established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 410.

III. DISCUSSION OF THE MERITS

As we noted in our prior Memorandum and Order, petitioner claims that counsel improperly failed to pursue a motion to suppress and/or strike two identifications made by Commonwealth witness Peter Fuller. Specifically, Mr. Fuller testified at trial, that while viewing photographic arrays after the incident, he was unable to identify anyone until Detective Jeffrey Piree took out the photograph of petitioner and his co-defendant and "suggested" that they were the ones involved. He stated that if the detective had not picked out the defendants' photographs, he "wouldn't have identified them." (N.T. 5/25/94, pp. 139-140, 146). Mr. Fuller could not identify petitioner at the preliminary hearing. Despite the impermissibly suggestive nature of this identification evidence, petitioner alleges that trial counsel improperly withdrew the motion to suppress.

The Pennsylvania Superior Court, reviewing petitioner's claim, acknowledged Mr. Fuller's concession that, prior to trial, he remained unsure of who really committed the crimes and that Detective Piree kept showing him photographs with the expectation that he would implicate someone. Notwithstanding these findings, the Superior Court held

that, based on the course of cross-examination, trial counsel had an obvious trial strategy in not seeking the suppression of Mr. Fuller's identifications. It opined that the witness's testimony concerning his pre-trial identification was relevant to the defense strategy of proving that the police framed petitioner for the incident so as to close the books on the matter. Letting the jury hear that Detective Piree coerced the witness into identifying photographs advanced that strategy. As such, the Superior Court concluded that trial counsel intentionally chose not to suppress Mr. Fuller's in-court identification in order to develop his theory of the case.

Upon re-reviewing the record, we find this ruling to be an unreasonable application of federal law. The Sixth Amendment to the United States Constitution recognizes the right of every criminal defendant to effective assistance of counsel. U.S. Const., amend. VI. In the case of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, *reh'g denied*, 467 U.S. 1267, 104 S. Ct. 3562 (1984), the Supreme Court set forth a two-prong test -- both parts of which must be satisfied -- by which claims alleging counsel's ineffectiveness are adjudged. First, the petitioner must demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." *Id.* at 688. The Supreme Court has explained that:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstance of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls

> within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 107, 76 S. Ct. 158, 163-164 (1955)). A convicted defendant asserting ineffective assistance must, therefore, identify the acts or omissions that are alleged not to have been the result of reasoned professional judgment. *Id.* at 690. The reviewing court must then determine whether, in light of all circumstances, the identified acts or omissions were outside "the wide range of professionally competent assistance." *Id.* It is well-established that appellate counsel cannot be ineffective for failing to raise a meritless claim. *See Strickland*, 466 U.S. at 691; *Holland v. Horn*, 150 F. Supp.2d 706, 730 (E.D. Pa. 2001).

Pursuant to the second prong, the defendant must establish that the deficient performance prejudiced the defense. It requires a demonstration that counsel's errors were so serious as to deprive the defendant of a fair trial or a trial whose result is reliable. *Strickland*, 466 U.S. at 687. More specifically, the defendant "must show that there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The Superior Court, in this case, ended its inquiry into petitioner's claim at the first prong of the *Strickland* analysis by finding that defense counsel's performance was based on sound trial strategy. Notably, however, they did so without ever holding any type of evidentiary hearing to

inquire into counsel's rationale for withdrawing his motion to suppress. "*Strickland* requires an analysis based on a complete record. The reviewing court's reasoning under the first prong needs to be made with an understanding of counsel's thought process . . . so that a conclusion whether counsel was ineffective can be made based on facts of record rather than assumptions." *Marshall v. Hendricks*, 307 F.3d 36, 115 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 1492 (2003) (criticizing lower court for assuming strategic considerations). The Superior Court's ruling, in this matter, was based on nothing more than speculation as to counsel's intentions. Under the clear mandate of *Strickland*, such speculation cannot be given unquestioned deference by his Court.

In an effort to resuscitate the state court's ruling, the Commonwealth now promulgates several arguments. First, it advocates that trial counsel's actions were, in fact, both motivated by strategy and justified by the circumstances. Second, it contends that, notwithstanding counsel's intentions, a motion to suppress and/or strike would not have had merit and, thus, counsel could not have been ineffective for failing to litigate it. Finally, even assuming that counsel was ineffective and that a motion to suppress would have had merit, the Commonwealth contends that plaintiff cannot prove the second *Strickland* element of prejudice. For ease of discussion, we address each argument separately.

A. Whether Counsel Acted Reasonably and Out of Sound Trial Strategy.

The Commonwealth initially claims that trial counsel's actions were well within the wide range of professionally competent assistance. In doing so, it offers three differing rationales for counsel's actions/failures. Primarily, it asserts that counsel intentionally withdrew the suppression

motion in order to evoke testimony from Mr. Fuller about improper police tactics. Its second rationale contends that counsel, rather than suppressing the identification, used an objectively reasonable alternate strategy of cross-examining Mr. Fuller so as to undermine any in-court identification. Finally, the Commonwealth asserts that, even if counsel's actions were not motivated by any defined strategy, his actions were justifiable in light of the circumstances surrounding Mr. Fuller's identification.

1. Rationale One -- Counsel's Use of Mr. Fuller's Identification as Part of His Defense Strategy.

In the first portion of its argument, respondent echoes the Superior Court's opinion and contends that the defense actually intended to elicit Fuller's in-court identification and testimony concerning the allegedly suggestive photographic display to show that the police had attempted to frame petitioner for this crime. To support this theory, the Commonwealth points to multiple record citations which allegedly evidence counsel's strategy. It focuses, primarily, on trial counsel's opening statement, wherein he first introduced the notion of the suggestive photo array and discussed the circumstances of Mr. Fuller's out-of-court identification following Detective Piree's selection of petitioner's picture from the stack of photos. (N.T. 5/24/94, at pp. 111-113). Further, it notes that, when cross-examining Mr. Fuller, subsequent to his in-court identification, trial counsel specifically elicited information regarding both Mr. Fuller's inability to identify the perpetrator during the preliminary hearing and the alleged suggestivity of the various photo arrays conducted by Detective Piree. (N.T. 5/25/94, 137-146). Finally, the Commonwealth points to counsel's closing argument, when he again made references to the improper actions of Detective Piree at

the photo array. The underlying motivation for each these actions, argues the Commonwealth, was counsel's attempt to further his overall defense strategy that police had manufactured and manipulated the evidence.

We find this analysis flawed on several fronts. First and foremost, we remark that, during the evidentiary hearing in this Court, counsel, Charles Mirarchi, was given the opportunity to explain his reasons for not moving, either prior to or during the trial, to suppress the in-court identification of Mr. Fuller. Despite this opportunity, he failed to confirm that the withdrawal of his motion to suppress constituted a deliberate attempt to introduce details of police overreaching. Indeed, at no point did he even intimate that he ever had any type of strategy or grand plan to use this identification for the defense's advantage. Rather, his sole explanation was that he was completely surprised by the identification at trial and did not know he could move to suppress it after it already had been elicited. Certainly, counsel's own words and his accompanying bewilderment regarding any suggested strategy far outweigh the unfounded speculation by the Commonwealth.

Additionally, the Commonwealth's "strategy theory" fails to explain why counsel did not move to strike/suppress the in-court identification during trial. Counsel could have easily elicited Mr. Fuller's testimony about the suggestive photo array and his statement that he only made the out-of-court identification at Detective Piree's urging, while also moving to suppress Mr. Fuller's potential in-court identification of petitioner. In doing so, counsel would have had the benefit of showing police overreaching and evidence manipulation, without the detrimental identification of petitioner as the shooter. As such, we find that counsel's failure

to move to suppress and/or strike Fuller's in-court identification did not constitute reasonable trial strategy.

2. Rationale Two -- Use of an Alternative and Equally Effective Strategy.

Respondent next argues that, even though counsel did not move to suppress the identification, the strategy that trial counsel actually followed -- scathing cross-examination of Mr. Fuller concerning his prior failure to identify petitioner at the preliminary hearing -- was an objectively reasonable one designed to undermine Mr. Fuller's in-court identification. Respondent specifically notes that trial counsel first belittled Mr. Fuller's explanation that he was uncomfortable at the preliminary hearing and then re-read portions of Fuller's preliminary hearing testimony wherein he could not identify petitioner as the shooter. Next, counsel elicited that Mr. Fuller had also told Detective Piree, on more than one occasion, of his uncertainty regarding the shooter's identification and that Detective Piree had essentially coerced the out-out-court identification. Finally, by way of cross-examination, counsel implied that the police and the assistant district attorney had pressured Mr. Fuller to be a better witness. These various tactics, according to respondent, effectively impeached Fuller, undermined his in-court identification and, thus constituted an objectively reasonable trial strategy.

What respondent fails to acknowledge, however, is that counsel's cross-examination was not a pre-planned tactic, but rather a response to an in-court [*19] identification that came as a complete surprise to him. Counsel had the chance to move for a complete suppression of Mr. Fuller's identification testimony based on an allegedly suggestive photo array.

By withdrawing the motion to suppress, counsel unwittingly surrendered this opportunity. While we recognize that the cross-examination was a valiant attempt at damage control, it does not negate the fact that counsel allowed an inculpatory identification of his client to be presented to the jury.[3]

3. Rationale Three -- Justification for Withdrawing the Motion to Suppress.

As a final effort to vindicate counsel's actions, the Commonwealth asserts that, even assuming that counsel had no strategy in allowing Fuller's identification, his failures were justifiable and within the bounds of professional norms due to the circumstances surrounding the identification. In particular, it contends that counsel had no basis upon which to litigate a pretrial motion to suppress. We find little merit to this point.

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[3] In support of its argument, respondent cites to a Seventh Circuit case wherein the court found that a defense counsel's decision to challenge the credibility of an eyewitness through extensive cross-examination concerning her prior failure to identify the defendant at a photo array was a reasonable trial tactic which defeated the defendant's claim of ineffective assistance based on counsel's failure to object to the witness's in-court identification of defendant as the robber. *Killebrew v. Endicott*, 992 F.2d 660 (7th Cir. 1993). We note, however, that this finding was essentially dicta, as the court already held that the procedures used during the witness's identification at the preliminary hearing were not unduly suggestive and, as such, any motion to suppress the identification at trial would have been futile. *Id.* at 665. Moreover, in that case, unlike the one at bar, the witness's description of the perpetrator was mistaken in multiple regards, thus allowing her testimony to be undermined to a greater degree. *Id.*

During the August 27, 2003 evidentiary hearing in this Court, counsel took the stand and testified that he recalled withdrawing his omnibus motion to suppress on the basis of Mr. Fuller's statement, at the preliminary hearing, that he could not positively make an identification of petitioner. Mr. Mirarchi indicated that he had no idea that Fuller was going to identify petitioner at trial and that he was totally surprised when an identification occurred. This "surprise," however, does not justify counsel's failures. Once the prosecution revealed that it planned to put Mr. Fuller on as a witness at trial, Mr. Mirarchi made no additional efforts through discovery to find out whether an identification would ultimately be made at trial. Indeed, logic alone suggested that because Mr. Fuller was both a victim and an eyewitness who had previously described the shooter, such an identification might occur. At a minimum, counsel could have made a precautionary motion to suppress.

Moreover, even assuming that Mr. Fuller's identification was a reasonable surprise, counsel made no motion, after the fact, to suppress and/or strike the in-court identification. In fact, during the August 27, 2003 evidentiary hearing, Mr. Mirarchi confessed that, despite his twenty-five years of practice, he did not know he could seek to strike the identification after it was made at trial.

The Commonwealth now argues that this latter failure was justified under Pennsylvania Rule of Criminal Procedure 581(B), which states that, "[u]nless the opportunity did not previously exist, or the interests of justice otherwise require, such motion shall be made only after a case has been returned to court and shall be contained in the omnibus pretrial motion . . . If timely motion is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived." The Commonwealth goes on to contend that because

petitioner knew of the allegedly suggestive photographic identification as of the preliminary hearing on March 25, 1993, he could not possibly show that he did not have the opportunity to litigate a suppression motion on this ground prior to the time that Fuller testified at trial. Nor did the interests of justice require that a suppression motion be heard mid-trial since the merits of the motion were by no means apparent.

Again, we cannot agree with the Commonwealth's argument. Pennsylvania Rule of Criminal Procedure 581(B) sets forth two instances in which an untimely motion to suppress may be heard: (1) when the opportunity to raise it did not previously exist or (2) when the interests of justice otherwise require. Whether either of these situations exist "is a matter for the discretion of the trial judge." *Commonwealth v. Long*, 753 A.2d 272, 279 (Pa. 2000) (quoting *Commonwealth v. Cooke*, 294 A.2d 1271, 1274 (Pa. Super. 1978).

Both situations could have been met in the case at bar. Under the first prong, the Commonwealth itself concedes that "at the time when a motion to suppress would have been litigated, there was no in-court identification to be suppresse[d]."[4] *See* Respondent's Memorandum of Law, at p.

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[4] In support of its argument, respondent cites the case of *Commonwealth v. Johnson*, 400 A.2d 583, 587 (Pa. 1979). In that case, the appellant argued that the trial court erred in admitting a witness's in-court identification where the identification was allegedly tainted by a suggestive pretrial identification. Appellant, however, did not object to the identification testimony until after it was given, when he moved that the testimony be stricken. The court held that because appellant knew of the allegedly suggestive

(Continued)

5. Turning to the second prong of Rule 581(B), "[a] trial judge should exercise discretion to hear an untimely oral suppression motion . . . in such situations 'where the merits of counsel's oral motion were so apparent that justice required it be heard.'" *Long*, 753 A.2d at 280 (internal quotations omitted). In light of Mr. Fuller's consistent and unwaivering testimony that Detective Piree selected petitioner's photograph from a larger group and then asked whether petitioner was the shooter, we can reasonably presume that the trial court would have exercised its discretion to hear the suppression motion, even notwithstanding Detective Piree's testimony to the contrary. Consequently, Rule 581(B) would not necessarily have foreclosed a motion to suppress and/or strike made during trial.

'n sum, we cannot find that trial counsel's actions fell within the wide range of reasonably professional assistance. Counsel clearly did not act based on any defined trial strategy -- a fact made evident by counsel's own testimony during evidentiary proceedings before this Court. Nor can we say that trial counsel's withdrawal of his pre-trial motion to suppress the in-court identification and subsequent failure during trial to move to suppress and/or strike the

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pretrial identification prior to trial, yet failed to file a motion to suppress the identification, the issue was waived. *Id.*

The case at bar is distinguishable due to the intervening preliminary hearing. While there was an allegedly suggestive pretrial identification in which Mr. Fuller inculpated petitioner, Mr. Fuller failed to make any identification during the subsequent preliminary hearing. Trial counsel testified that, based on that failure, he did not believe that Mr. Fuller would make an identification at trial.

identification were justified in light of the circumstances. Consequently, we reject this portion of respondent's argument.

B. Whether a Motion to Suppress Would Have Had Merit.

In a second effort to justify the state court's ruling on petitioner's claim, respondent contends that even had trial counsel moved to suppress Mr. Fuller's in-court identification, such a motion would not have had merit. On this point, it offers two separate arguments. First, it claims that, considering the conflicting testimony of Mr. Fuller and Detective Piree, the photo array itself was not suggestive and, thus, not a ground for a motion to suppress. Second, it asserts that even if the photo array could be deemed suggestive, Mr. Fuller's in-court identification was the untainted product of an independent source. Again, we take each of these points in turn.

1. Suggestivity of the Photo Array

The Due Process Clause prohibits the use of identification procedures which are "unnecessarily suggestive and conducive to irreparable mistaken identification." *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972 (1967). In *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 961 (1968), the United States Supreme Court recognized that the "improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals." *Id.* at 383, 88 S. Ct. at 971. If police single out particular photographs or indicate that they have evidence implicating one of the individuals in the photographs, the chance of misidentification is heightened, thereafter reducing the trustworthiness of a subsequent lineup or in-court identification. *Id.* at

383-384. In other words, the Court theorized that a witness, upon being subjected to a suggestive photo array, may retain the image of the suggested perpetrator in his or her mind, making any later identifications potentially inaccurate. *Id.*

Despite its acknowledgment of the hazards inherent in initial identification by photograph, however, the Supreme Court declined to blanketly prohibit its employment as unconstitutional. *Id.* at 384. Rather, it held that "each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 384.

During the preliminary hearing, in the case at bar, Mr. Fuller indicated that the photo array conducted by Detective Piree was unduly suggestive. Specifically, he explained that Piree handed him a stack of approximately 100 photographs and told him to go through them. (N.T. 3/25/93, at pp. 24-25). Subsequently, Piree picked out two of the photographs, those of petitioner and his co-defendant, and told him to look at them "real good." *Id.* Piree then asked, "Do you think these are the two, I don't want to press it on you." *Id.* at p. 25. Fuller then indicated that they were the closest that came to describing the shooters he saw. *Id.* Prior to Detective Piree pointing out these photographs, Fuller had not noticed them. *Id.* at pp. 28-29. Later during the preliminary hearing, Mr. Fuller reiterated that had Detective Piree not picked out any of the photographs from the pile, he would not have identified anyone. *Id.* at 44. During trial, after having made an in-court identification of petitioner, Mr. Fuller again reaffirmed his version of events, indicating again that Detective Piree selected the photos for him and that he

would not have otherwise identified petitioner as the culprit. (N.T. 5/25/94, pp. 137-146).

Mr. Fuller's testimony, however, was contradicted by that of Detective Piree. Detective Piree testified at trial that Mr. Fuller had viewed photographs on three different occasions and did not identify anyone during either of the first two. During the third array, however, Mr. Fuller was shown 24 photographs, including those of petitioner and Shaurn Thomas. This array was the identical one given to Christopher Young a short time prior. According to Detective Piree, Mr. Fuller identified petitioner and Shaurn Thomas as perpetrators and stated, "I believe it is them." The detective explicitly denied Fuller's allegation that two photographs were singled out. (N.T. 5/25/94, 216-220, 223).

In light of this conflicting testimony, the Commonwealth now contends that a motion to suppress would not have had merit since the suggestive nature of the photo array remains disputed. This argument, however, turns on a credibility determination. Although such findings should normally be made at the state level, neither the trial court nor the PCRA court either had or took the opportunity to hear from these two witnesses. This Court made an effort to develop the record, by way of an evidentiary hearing, but these efforts were fruitless. While respondent produced both witnesses on September 10, 2003, petitioner was mistakenly not brought into court by the imprisoning authority. Petitioner's counsel declined to waive his appearance and allow the hearing to proceed that day. Rather than postponing the hearing to a different date, as was proposed by the Court, both counsel for respondent and petitioner agreed to rest on the record as already developed.

Such events leave this Court in somewhat of a conundrum. While we must decide the crucial question of whether the photo array shown to Mr. Fuller was suggestive, and thus tainted his in-court identification, we have only the starkly conflicting testimony of Mr. Fuller and Detective Piree on which to base this determination. To resolve our dilemma, we turn to the operating burdens of proof. We recognize that petitioner bears the burden of proving his entitlement to the writ of habeas corpus. He need only show, however, that his counsel's actions were below the norm of professionally reasonable assistance. As he has already done so, we must now inquire into what the result would have been had counsel, in light of the record as it now stands, made such a motion at the state trial level. Pursuant to Pa. R. Crim. P. 581(H), "[t]he Commonwealth shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of defendant's rights." As such, the Commonwealth carries both the burden of production and persuasion of establishing by a preponderance of the evidence that the photo array was not improperly suggestive. *See Commonwealth v. Culp*, 548 A.2d 578, 581 (Pa. Super. 1988).

As this Court has heard neither the testimony of Detective Piree nor the testimony of Mr. Fuller, we cannot assign any credibility ratings to either of them. Their versions of events stand in direct contradiction of one another. The Commonwealth, however, retains the burden of persuasion to prove, by a preponderance of the evidence, that Detective Piree's version of the story is accurate. It has not done so. Consequently, we must accept petitioner's position and deem the out-of-court identification improper.

2. Mr. Fuller's Identification as the Product of an Independent Source

Respondent next claims that, even assuming the photo array was impermissibly suggestive, Mr. Fuller's identification constituted the product of an independent source. "[R]eliability is the linchpin in determining the admissibility of identification testimony . . . ." *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977). If, following a suppression hearing, a trial court finds that out-of-court identifications were impermissibly suggestive, it may also exclude the in-court identification, unless an independent basis for that in-court identification exists. *DiAngelo v. U.S.*, 406 F. Supp. 880, 882 (D.C. Pa. 1976), *aff'd*, 566 F.2d 1168 (1977). In *United States v. Higgins*, 458 F.2d 461 (3d Cir. 1972), the Third Circuit Court of Appeals set out seven factors to be considered in making this determination:

> (1) the manner in which the pre-trial identification was conducted;
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> (2) the witness' prior opportunity to observe the alleged criminal act;
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> (3) the existence of any discrepancies between the defendant's actual description and any description given by the witness before the photographic identification;
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> (4) any previous identification by the witness of some other person;
>
> (5) any previous identification of the defendant himself;

> (6) failure to identify the defendant on a prior occasion; and
>
> (7) the lapse of time between the alleged act and the out-of-court identification.

458 F.2d at 465. Although each individual factor is important, the "totality of surrounding circumstances" governs the ultimate determination. *Id.* Again, "the primary evil to be avoided is a very substantial likelihood of irreparable misidentification." *Neil v. Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 31 (1972).

Our task at hand, then, mandates that we assess the case at bar under each of these individual factors, with a mind towards ultimately determining whether Mr. Fuller's in-court identification was made from his own independent recollection. The first factor, the manner in which the pre-trial identification was conducted, clearly weighs in favor of petitioner. As we concluded above, the identification was unduly suggestive in that Detective Piree singled out the photographs of petitioner and his co-defendant.

To assess the second factor, the witness's prior opportunity to observe the event, we turn to the state court record. Mr. Fuller testified, at the preliminary hearing that, at the time of the crime, he was focused on his chess game with bar owner Harry James when a man came in and pulled out a pistol. (N.T. 3/25/93, at pp. 8-9). He explained that the house was dim and his back was towards the door. (N.T. 3/25/93, at p. 10, 24). At that point, the man that pulled the gun was maybe two and a half feet away from him. Mr. Fuller was not really paying attention, but rather remained focused on his chess game. *Id.* at 10-11, 46. Harry James

then jumped out of his chair, grabbed the gun and Mr. Fuller heard a shot. *Id.* at 11. Immediately afterwards, he hit the floor and indicated that he was in a panic state. *Id.* at 11-12. Mr. Fuller then testified that he jumped up and ran to the kitchen door only to find that it was barricaded, so he started back toward the front door. *Id.* at 12-13. On his way back, the man with the gun saw Fuller and Fuller saw him as they stood approximately seven or eight feet apart. *Id.* at 14-15. When asked if they were facing each other, Fuller testified, "Yes, I was facing him, but you know it was just -- it happened so fast." *Id.* at 14. The man said, "[y]ou want some too," fired at Fuller, Fuller ducked and the bullet hit him in the right shoulder. *Id.* at 15.

Mr. Fuller likewise testified at trial regarding his opportunity to observe the shooting. He repeated that he was not paying attention to what was going on at the front door since he was focused on his chess game. (N.T. 5/25/94, at p. 119). As a result, he did not see the shooter come in initially. *Id.* at 120. He again related the details of that night, but could not be sure whether the shooter went through James's pockets or whether there was another person there. *Id.* at 123-124.

Considering the totality of this testimony, we find that Mr. Fuller did have an opportunity to observe the shooter, albeit not the best opportunity. For much of the crime, Mr. Fuller was either concentrating on his chess game, on the floor, in the kitchen or lying on the ground with a bullet in his shoulder. During the moments that Fuller and the shooter were facing each other, Fuller indicated that "it happened so fast" or that he was in a state of panic. (N.T. 3/25/93 at pp. 11-12, 14). Hence, this factor, while not weighing against the Commonwealth, does not decidedly advocate in favor of its case either.

Turning to the third factor, the record does not evidence any discrepancies between Mr. Fuller's description of the shooter on the night of the crime and petitioner's actual appearance. During the preliminary hearing, Mr. Fuller indicated that he had described the shooter to the police as a very dark and rough-skinned man, standing about five seven or five eight and who was approximately 39 or 40 years of age. (N.T. 3/25/93, at p. 27). Likewise, in his statement to police on the night of the crime, plaintiff gave the following description:

> He was dark skinned, thin about 5'7" to 5'8" tall, his face had rough skin. It was more like chicken po[x] but I just thought he had bad skin. He had on a light weight navy blue jacket about the same length as mine. He had on Wranglers. I didn't notice his shoes. He wasn't wearing a hat. His hair was close cut. I don't think he had mixed gray hair. About 38 years old he looked to be.

Respondent's Memorandum of Law, at Exhibit B.

Undoubtedly, this description closely matched that of petitioner's. As pointed out by respondent, petitioner, at the time of arrest, was 42 years old, 142 pounds and 5'7". His hair was closely cut, his skin tone was dark and his skin condition was rough or "bad." The absence of any discrepancies between description and actual appearance lends support to respondent's claim.

The fourth factor -- any previous identification by Mr. Fuller of some other person -- has little bearing on the matter

before us. Mr. Fuller was shown hundreds of photographs by police, but did not identify anyone else as the shooter.

The fifth and sixth factors concern any previous identifications of defendant or failures to identify defendant. Other than during the improperly suggestive photo array and trial, Mr. Fuller never made any other identifications of petitioner. Indeed, quite the opposite occurred. At the preliminary hearing, a mere four months after the incident in question, Mr. Fuller was questioned regarding the events on the night of the crime. Thereafter, the following exchange occurred:

Q: Did you see anybody that was there that night that's in the room today?

A: I am not really sure. I can't be positive. I can't be positively sure.

MR. TINARI: Objection.

Q: You can't be positively sure, what do you mean --

THE COURT: Let the record reflect that the witness took 25 seconds to look at the defendants at the defense table. What do you mean you're not sure.

A: I mean that the gentleman sitting over there, he could be the one. I am not sure.

THE COURT: Which one, what is he wearing if you could tell us?

A: He's wearing a blue and black sweater.

MR. MIRARCHI: Indicating Clayton Thomas.

THE COURT: He would be the one, you're not sure.

A. I am not sure.

THE COURT: That's fair enough.

(N.T. 3/25/93, at pp. 16-17). Ultimately, Mr. Fuller failed to inculpate petitioner as the shooter until over one year later at trial. (N.T. 5/25/94, at pp. 129-30).[5]

Finally, under the last factor, the record does not reflect a specific date on which the out-of court identification occurred. We do know, however, that it took place sometime between the December 1992 shooting and the March 25, 1993 preliminary hearing, thus meaning that the identification occurred within, at most, a few months of the crime. His subsequent failure to identify occurred on March 25, 1993. Finally, the in-court identification occurred on May 25, 1994, approximately a year and a half after the shooting.

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[5] When cross-examined as to this discrepancy, Mr. Fuller explained that, "[f]irst of all, I was very nervous and it was kind of -- I felt as though it was kind of unfair for me, because I never testified or anything like this before and it was kind of unfair to me. I felt as though I was put under a lot of pressure." *Id.* at 134. This testimony, however, does not explain why Mr. Fuller, once nervous while on the stand, was able to gain confidence during trial and suddenly identify the petitioner.

Individually, the above factors weigh partially in favor of petitioner's claim and partially in favor of respondent's argument. Considering them in conjunction, however, we simply cannot be confident that Mr. Fuller's identification was the product of an independent source. While we recognize that he had the opportunity to see the shooter and ultimately managed to identify Clayton Thomas as the culprit, we question the conviction with which that identification was made. Repeatedly, Mr. Fuller emphasized that, during the crime, he was focused on his chess game, that he was upset and panicked, that things were moving quickly and that he dropped to the floor. Mr. Fuller provided a good description of the shooter subsequent to trial, yet, at a photo spread shortly thereafter, he was unable to pick out petitioner's photograph until Detective Piree singled it out. Even at that time, Mr. Fuller stated not that petitioner was definitely the shooter, but only that his photo came the closest. At the preliminary hearing, when confronted with petitioner face-to-face, Mr. Fuller took a close look at him, but simply could not be positive that it was him. Fourteen months later, however, and only after having viewed petitioner's photograph and having seen petitioner at the preliminary hearing, Mr. Fuller was suddenly certain that petitioner was the shooter. These circumstances give rise to "the very substantial likelihood of irreparable misidentification" cautioned against by the Supreme Court in *Simmons*, *supra*. Indeed, we find it quite likely that the in-court identification was significantly swayed by Mr. Fuller's pre-trial exposure to petitioner's photograph. As such, we cannot agree with the Commonwealth that Mr. Fuller's in-court identification was the product of an independent source.

C. Whether Petitioner Suffered Prejudice.

In its final effort to undermine petitioner's claim, respondent asserts that, assuming *arguendo* petitioner could meet the first prong of the *Strickland* test, he fails to establish prejudice under the second prong. Specifically, it claims that eyewitness Christopher Young also identified petitioner as the shooter, thereby making Mr. Fuller's testimony merely cumulative.

As we stated in our previous Report and Recommendation, however, we find respondent's arguments unconvincing. The remainder of the Commonwealth's case against petitioner consisted of the testimony of Christopher Young. At trial, Young identified petitioner as the shooter approximately five times. (N.T. 5/25/94, at pp. 65, 80, 82, 89, 91). His testimony, however, was far from credible. At the outset, Young failed to implicate petitioner, forcing the Commonwealth to introduce his prior inconsistent statement to police that petitioner and his son Shaurn were the perpetrators. *Id.* at 20-21, 34-35. Moreover, on both direct and cross-examination, Young indicated that he was scared of the police and thought he was going to be locked up for the murder. *Id.* at 92. Indeed, he stated that the police threatened that he would "go down" or be arrested for the murder if he did not talk and name the murderer. *Id.* at 29-30, 39-40. In addition, Young had given multiple, varying statements to police. *Id.* at 69-71. While he could not identify petitioner in his first statement, he was able to do so in the second statement. To explain this inconsistency, Young testified that, during the photo array after his first statement, the detective stated, "[i]f you don't tell me if this man [indicating petitioner] and Shaurn killed Harry, you are going down for the murder." *Id.* at 96. Finally, Young implied, on cross-examination, that he too was subject to a suggestive photo

array. He stated that when initially given a stack of photographs by Detective Piree, he could not identify anyone. *Id.* at 99. Subsequently, the detective pulled two pictures out of the stack and asked, "[a]ren't these the two men?" thereby tainting any ensuing identification. *Id.*

Certainly, these circumstances did not lend a great deal of credibility to Young's account of the crime. He changed his story repeatedly and, only when badgered about these inconsistencies, did he positively identify petitioner. Moreover, he indicated an obvious motive to lie -- fear that if he did not implicate petitioner, he was going to be charged with the crime. Finally, his photo array bore the same tinge of suggestivity as that of Mr. Fuller's. Had this testimony stood on its own, as the sole implication of petitioner without the corroboration of Mr. Fuller, we cannot say, with confidence, that petitioner would have been convicted. Indeed, we find a reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different. As this finding is sufficient to establish prejudice, we must deem the second prong of *Strickland* satisfied.

IV. CONCLUSION

Notwithstanding the vigorous and well-articulated arguments by respondents, this Court finds grounds warranting the grant of the writ of habeas corpus. Petitioner adequately proved that counsel's conduct fell outside the bounds of reasonably professional conduct. Further, he established that a motion to suppress would have indeed had merit and resulted in the suppression of Mr. Fuller's in-court identification. Finally, based on the record before us, the failures of counsel undermine our confidence in the outcome of the trial. Consequently, we recommend that the petition before us be

granted and that petitioner be given a new trial within ninety days.[6]

Therefore, I make the following:

RECOMMENDATION

AND NOW, this 24th day of *September*, 2003, IT IS RESPECTFULLY RECOMMENDED that the Petition for Writ of Habeas Corpus be GRANTED and that petitioner be given a new trial within one hundred and twenty (120) days from the date this Recommendation is approved. There exists probable cause to issue a certificate of appealability.

/s/
CHARLES B. SMITH
UNITED STATES
MAGISTRATE JUDGE

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[6] For the reasons set forth at length in our Memorandum and Order dated June 10, 2003, we recommend that the petitioner's remaining habeas claims be dismissed on their merits.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAYTON THOMAS,	:	CIVIL ACTION
Petitioner	:	
	:	
VS.	:	
	:	
BEN VARNER,	:	
AND	:	
THE DISTRICT ATTORNEY	:	
OF THE COUNTY OF	:	
PHILADELPHIA,	:	
AND	:	
THE ATTORNEY GENERAL	:	
OF THE STATE OF PENN-	:	
SYLVANIA,	:	
Respondents	:	NO. 02-4778

MEMORANDUM AND ORDER

ENTERED: June 11, 2003

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

Currently pending before the Court is a Petition for Writ of Habeas Corpus filed, pursuant to 28 U.S.C. § 2254, by a petitioner incarcerated in the State Correctional Institution at Smithfield, Pennsylvania. For the reasons which follow, we grant an evidentiary hearing on petitioner's claim of ineffective assistance of counsel for failure to move to suppress a witness identification.

I. PROCEDURAL HISTORY

Following a jury trial presided over by the Honorable Jane Cutler Greenspan of the Philadelphia Court of Common Pleas, petitioner was convicted, on May 31, 1994, of second degree murder, robbery, aggravated assault and possession of an instrument of crime. According to the Pennsylvania Superior Court,

> The charges stemmed from the robbery of a speakeasy located in the City off Philadelphia. Accompanied by a person who acted as look-out, [petitioner] entered the speakeasy brandishing a firearm and ordered the occupants to the floor. The proprietor of the establishment, Harry James, had been playing chess with a customer, Peter Fuller. Mr. James was fetching a beer for another customer when [petitioner] arrived. Instead of complying with [petitioner's] order, Mr. James leaped at [petitioner] and began to struggle with him. During the course of this altercation, [petitioner] shot Mr. James in the chest. The victim subsequently died of his wound. [Petitioner] also shot Mr. Fuller in the shoulder. Mr. Fuller survived.

Superior Court Opinion (2000), pp. 1-2. After the convictions,[1] Judge Greenspan sentenced petitioner to a term of life imprisonment. Although trial counsel failed to file a timely notice of appeal, petitioner's direct appeal rights were reinstated on October 28, 1996, at which time petitioner appealed

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[1] Notably, petitioner's co-defendant and son, Shaurn Thomas, was acquitted of all charges.

to the Pennsylvania Superior Court. By way of memorandum opinion, issued May 5, 1998, the Superior Court affirmed the judgment of sentence. Petitioner did not seek allowance of appeal from the Pennsylvania Supreme Court.

On April 6, 1999, petitioner filed a *pro se* petition pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541, *et seq*. Thereafter, petitioner retained counsel, who filed both an amended and a supplemental petition. Without conducting an evidentiary hearing, the PCRA court summarily denied the petitions on June 27, 2000. The Pennsylvania Superior Court affirmed on December 12, 2001, adopting, in part, some of the reasoning of the PCRA court. On July 9, 2002, the Pennsylvania Supreme Court denied petitioner's request for allowance of appeal.

Petitioner filed the instant Petition for Writ of Habeas Corpus on July 18, 2002, raising the following issues for review:

1. Ineffective assistance of trial counsel for failure to object to the introduction of his co-defendant's statements which constituted a violation of his Sixth Amendment right to confrontation as set forth in *Bruton v. United States*, 291 U.S. 123 (1968), or to otherwise request a cautionary instruction;

2. Ineffective assistance of trial counsel for failure to move to suppress a witness identification that was both impermissibly suggestive and constitutionally unreliable;

3. Prosecutorial misconduct for improperly attempting to bolster the credibility of central witnesses Christopher Young and Detective Piree in violation of petitioner's Fifth and Fourteenth Amendment rights to due process.[2]

Having considered the opposing arguments, the Court now turns to a discussion of the issues before us.

II. STANDARD OF REVIEW

Under the current version of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an application for writ of habeas corpus from a state court judgment bears a significant burden. Section 104 of the AEDPA imparts a presumption of correctness to the state court's determination of factual issues -- a presumption that petitioner can only rebut by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (1994). The statute also grants significant deference to legal conclusions announced by the state court, as follows:

> An application for a writ of habeas corpus on behalf of a State court shall not be granted

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[2] In his actual habeas petition, petitioner raises a fourth claim of ineffective assistance of counsel for failing to impeach the primary adverse witness with his criminal record. Without providing any other argument, he thereafter refers to his "Memorandum of Law, to be filed." In that Memorandum of Law, he does not address this issue at all. Absent any further discussion by petitioner, we shall likewise not address this issue.

> with respect to any claim that was adjudicated on the merits in State court proceedings unless that adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The United States Supreme Court, in the case of *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000), interpreted the standards established by the AEDPA regarding the deference to be accorded to state court legal decisions, and more clearly defined the two-part analysis set forth in the statute. *Williams*, 529 U.S. at 404-405. Under the first part of the review, the federal habeas court must determine whether the state court decision was "contrary to" the "clearly established federal law, determined by the Supreme Court of the United States." As defined by Justice O'Connor, writing for the majority of the Court on this issue, a state court decision can be contrary to Supreme Court precedent in two ways: 1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or 2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent

and arrives at a result opposite to that reached by [the Supreme Court]." *Id.* The Court explained, however, that this "contrary to" clause does not encompass the "run-of-the-mill state-court decisions" applying the correct legal rule from Supreme Court cases to the facts of the prisoner's case." *Id.* at 406.

To reach such "run-of-the-mill" cases, the Court turned to an interpretation of the "unreasonable application" clause of § 2254(d)(1). It found that a state court decision can involve an unreasonable application of Supreme Court precedent: 1) "if the state court identifies the correct governing legal rule from the Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or 2) "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context should apply." *Williams*, 529 U.S. at 407-408. The Court specified, however, that under this clause, "a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly-established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 410.

III. DISCUSSION OF THE MERITS

In his attempt to obtain habeas relief, petitioner sets forth three separate ineffective assistance of counsel claims. We first address the standard governing these claims and then discuss them on their merits.

A. Standard for Ineffective Assistance of Counsel Claims

The Sixth Amendment to the United States Constitution recognizes the right of every criminal defendant to effective assistance of counsel. U.S. Const., amend. VI. In the case of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, *reh'g denied*, 467 U.S. 1267, 104 S. Ct. 3562 (1984), the Supreme Court set forth a two-prong test -- both parts of which must be satisfied -- by which claims alleging counsel's ineffectiveness are adjudged. First, the petitioner must demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." *Id.* at 688. The Supreme Court has explained that:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstance of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 107, 76 S. Ct. 158, 163-164 (1955)). A convicted defendant asserting ineffective assistance must, therefore, identify the acts or omissions that are alleged not to have been the result of reasoned professional judgment. *Id.* at 690. The reviewing

court must then determine whether, in light of all circumstances, the identified acts or omissions were outside "the wide range of professionally competent assistance." *Id.* It is well-established that appellate counsel cannot be ineffective for failing to raise a meritless claim. *See Strickland*, 466 U.S. at 691; *Holland v. Horn*, 150 F. Supp.2d 706, 730 (E.D. Pa. 2001).

Pursuant to the second prong, the defendant must establish that the deficient performance prejudiced the defense. It requires a demonstration that counsel's errors were so serious as to deprive the defendant of a fair trial or a trial whose result is reliable. *Strickland*, 466 U.S. at 687. More specifically, the defendant "must show that there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

B. Failure to Object to an Alleged Violation of Sixth Amendment Right to Confrontation

In his first substantive claim, petitioner challenges defense counsel's failure to object to the admission of out-of-court statements made by his co-defendant, Shaurn Thomas, despite the fact that Shaurn never testified. By way of background, petitioner contends that eyewitness Christopher Young had given two statements to police. In his first statement, Young said he could not identify the perpetrators of the crime. In his second statement, however, he inculpated both petitioner and his co-defendant. Relying on this latter statement, the Commonwealth called Young to testify at trial against both defendants. When Young refused to implicate petitioner in his direct trial testimony, the Commonwealth

called Detective Jeffrey Piree to read into evidence Young's earlier statement to police. In the first part of that statement, Young asserted:

> I was starting to leave out and [petitioner] said Mr. Harry got a speak down where you live. He said we can get paid off of that. I said, no, I am not into stickups. Then Shaurn [co-defendant] said to his father, no dad, people know me down there by Mr. Harry's speak-easy.

(N.T. 5/25/94, pp. 176-178). Subsequently, in that statement, when responding to Detective Piree's inquiry as to whether petitioner and Shaurn Thomas ever gave anything to Mr. Young, Young stated:

> No. They never even said how much they got and I never asked, but a couple of days later, I seen or talked to Shaurn when he called me at Peachy's house and he told me it was stupid for him and his dad to rob Harry and wrong for his dad to have shot Harry and Pete.

(N.T. 5/25/95, pp. 185). Petitioner now claims that the admission of these statements, without redaction of the references to him as Shaurn's father, violated his Sixth Amendment right to confrontation.

The Superior Court addressed this claim on review from the trial court's denial of PCRA relief. It found that trial counsel was not ineffective for failing to object to the unredacted statements since he actually used the challenged remarks to bolster the defense theory that Young fabricated evidence to curry favor with the police. It remarked

specifically that Young testified that he only told police what they wanted to hear because Detective Piree said he would "go down" for the murder unless he gave up petitioner. *See* Superior Court Opinion (2001), at pp. 12-13. During closing, counsel for petitioner's co-defendant emphasized this testimony, contended that the entirety of the second statement given to police was coerced, including the hearsay statements allegedly uttered by Shaurn Thomas, and asserted that Young's first statement to police was more trustworthy than this later account. Counsel further highlighted for the jury Young's fear of the police and his motivation to lie to appease them with any details they might find helpful. *Id.* at 14. Relying on these various factual findings, the Superior Court held that petitioner's counsel was acting out of reasonable trial strategy by not objecting to the hearsay statements. It remarked that simply because the strategy was unsuccessful, it could not be deemed so unreasonable that no competent lawyer would have chosen it.

Considering this state court ruling, this Court remains somewhat troubled. We note, at the outset, that while we are required to give deference to the state courts' factual conclusions, *see* 28 U.S.C. § 2254, and while the question of whether or not counsel made an informed tactical decision is a question of fact, *Thames v. Dugger*, 848 F.2d 149, 151 (11th Cir. 1988), the state's findings were made absent any type of evidentiary hearing and only upon speculation regarding trial counsel's actual strategy. As petitioner aptly points out, the state courts, without an inquiry into counsel's state of mind, could not discern whether counsel actually did have a reasonable strategy in mind or simply failed to appreciate the propriety of an objection on this issue. Indeed, petitioner correctly notes that trial counsel could have easily allowed the admission of the first portion of Young's statement, which evidenced police overreaching, while likewise moving

to exclude Shaurn Thomas's embedded hearsay comment regarding petitioner's guilt. Alternatively, if counsel had truly strategized in accordance with the state courts' speculation, he could have sought a cautionary instruction to limit the jury from considering Shaurn's out-of-court confessions as substantive evidence of guilt. In light of these factors, we cannot find that the state court's decision was a reasonable application of the *Strickland* standard for effective assistance of counsel.

Nonetheless, we still find that petitioner's claim does not merit habeas relief, albeit on a different ground. Specifically, we hold that while counsel, even in pursuit of the strategy proposed by the state courts, could have objected to the admission of Shaurn Thomas's out-of-court statements, such an objection would have been rejected as meritless. Because counsel cannot be ineffective for failing to make such a fruitless objection, petitioner cannot succeed on his *Strickland* claim. *Holloway v. Horn*, 161 F. Supp.2d 452, 555 (E.D. Pa. 2001).

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const., Amend VI. "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845, 110 S. Ct. 3157, 3163 (1990). Hence, when defendants are tried jointly, a "confession of one cannot be admitted against the other unless the confessing witness takes the stand." *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S. Ct. 1702, 1707 (1987).

In *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968), the Court held that a defendant's constitutional right to confrontation is denied when the confession of a co-defendant, which implicates the defendant, is admitted at trial but the co-defendant is not subjected to cross-examination. *Id.* at 127-128. In *Bruton*, the co-defendant's confession directly implicated the defendant. *Id.* at 124. The court found that the use of that statement at trial, when the maker did not testify, violated the Sixth Amendment even though the trial court later instructed the jury that the co-defendant's confession could only be used against the co-defendant himself and not against the defendant. *Id.* at 137. The Court reasoned that in a joint trial, where the defendant and the confessing co-defendant stand side-by-side, "the risk that the jury will not, or cannot, follow [the trial court's limiting] instructions is so great, and the consequences so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135. Hence, the *Bruton* Court found limiting instructions to be an inadequate substitute for a defendant's constitutional right of cross-examination. *Id.* at 137.

Although *Bruton* dealt solely with a co-defendant's confession, more recent cases citing the Supreme Court's opinion have expanded the rule to include any hearsay statements which implicate the defendant. *See Monachelli v. Warden*, 884 F.2d 749, 753 (3d Cir. 1989). These cases, however, do not suggest that hearsay statements of a co-defendant, which are properly admitted under an exception to the hearsay rule, necessarily violate the Sixth Amendment, even if they inculpate the defendant. *See Bruton*, 391 U.S. at 128, n. 3 ("There is not before us . . . any recognized exception to the hearsay rule . . . and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause"). Indeed, it is well-established that

Bruton does not prohibit the admission of inculpatory statements of co-defendants which bear sufficient "indicia of reliability" in that they are admissible under a "firmly rooted" hearsay exception or otherwise have "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 65-66, 65, 100 S. Ct. 2531, 2539 (1980); *Lilly v. Virginia*, 527 U.S. 116, 125, 119 S. Ct. 1887, 1894-1895 (1999); *Dutton v. Evans*, 400 U.S. 74, 80, 91 S. Ct. 210, 215 (1999); *United States v. Steinmetz*, 643 F. Supp. 537, 541 (M.D. Pa. 1986).

The question in the case before us then becomes whether co-defendant Shaurn Thomas's hearsay statement to Christopher Young fell within a firmly rooted hearsay exception or had particularized guarantees of trustworthiness. The Supreme Court described a hearsay exception as "'firmly rooted' if, in light of 'longstanding judicial and legislative experience,' . . ., it 'rest[s] [on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the 'substance of the constitutional protection.'" *Lilly*, 527 U.S. at 126 (internal quotations omitted). The Supreme Court has consistently found that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not necessarily justify its use as evidence against another person. *See Gray v. Maryland*, 523 U.S. 185, 194, 118 S. Ct. 1151, 1156 (stating that because the use of an accomplice's confession "creates a special, and vital, need for cross-examination," a prosecutor desiring to offer such evidence must comply with *Bruton*, hold separate trials, use separate juries, or abandon the use of the confession). Underlying this position is the theory that "when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee v. Illinois*, 476 U.S. 530,

541, 106 S. Ct. 2056, 2062 (1986). As such, the Supreme Court, beginning in the case of *Lilly v. Virginia*, *supra*, has repeatedly viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of those "hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements'] reliability." *Lilly*, 527 U.S. at 132. The admission of such statements at a joint trial where the declarant is unavailable to testify, then, is presumptively a violation of the Sixth Amendment Confrontation Clause. *Id.* at 137.[3]

This general position, however, does not suggest that all accomplice hearsay statements which implicate a defendant in a crime are a *per se* violative of the Sixth Amendment Confrontation Clause. Rather, the presumption of unreliability is precisely that -- a presumption, which may be rebutted by a showing that the statement is supported by "particularized guarantees of trustworthiness." *Lee*, 476 U.S. at 543. "[T]he very fact that a statement is genuinely self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." *Williamson v. United States*, 512 U.S. 594, 605, 114 S. Ct. 2431, 2437 (1994).

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[3] For example, in *Lilly*, the Supreme Court disallowed the out-of-court statement of the defendant's brother who, under police questioning, conceded that he was involved in a shooting but identified the defendant as the triggerman. *Lilly*, 527 U.S. at 139. The Court's main concern was with statements in which, as often found in police-station confessions, the declarant admits what can easily be proven against him, but then shifts principal blame to another against whom the prosecutor offers the statement at trial. *Id.* at U.S. 138-139.

In *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210 (1970), the Supreme Court ruled that a statement by a prosecution witness, who testified that defendant's co-conspirator had, while in prison where both were incarcerated, stated that had it not been for defendant "we wouldn't be in this now," was admissible against defendant as substantive evidence of his guilt, even though the co-conspirator was unavailable to testify. *Id.*, 91 U.S. at 88-89. It recognized that, "[f]rom the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only to what he has seen but also as to what he has heard." *Id.* at 88. Where there are adequate "indicia of reliability" a statement may thus be placed before a jury though there is no confrontation of the declarant. *Id.* at 89. In that case, the statement in question contained no express assertion about past fact, the declarant had clearly-established personal knowledge as to the identity and role of the other participants in the triple murder, the possibility that the declarant's statement was founded on faulty recollection was remote, the declarant had no apparent reason to lie to the witness, the statement was spontaneous and it was against the declarant's penal interest. *Id.* at 88-89.

Other courts have followed *Dutton*'s lead and have distinguished *Lilly* where certain indicia of reliability surrounded the hearsay statement sought to be introduced. For example, in *United States v. Shea*, 211 F.3d 658 (1st Cir. 2000), *cert. denied*, 531 U.S. 1154, 121 S. Ct. 1101 (2001), the First Circuit recognized that *Lilly*'s "main concern was with statements in which, as is common in police-station confessions, the declarant admits only what the authorities are capable of proving against him and seeks to shift the principal blame to another (against whom the prosecutor then offers the statement at trial)." *Id.* at 669. In *Shea*, however,

the statements implicating defendants in the crime, were against the declarants' penal interest, were all made to friends or companions, not to the police and were not of the "blame shifting" variety. *Id.*

Likewise, in *United States v. Photogrammetric Services, Inc.*, 259 F.3d 229 (4th Cir. 2001), *cert. denied*, 535 U.S. 926, 122 S. Ct. 1295 (2002), the defendant corporation was not entitled, under the Confrontation Clause, to suppress incriminating statements made by its co-defendant employee, who did not testify at trial. *Id.* at 245-246. The court found that the statements were self-inculpatory, implicating the employee in the criminal conduct, and therefore had particularized guarantees of trustworthiness. *Id.* Moreover, although the statements were made to law enforcement agents and the agents' informant, they made no attempt to shift or spread blame to another, which would call the reliability of the statements about his co-defendant into question. *Id.*

Although the United States Supreme Court has yet to explicitly enumerate factors to be considered in determining whether there are particularized guarantees of trustworthiness, the Pennsylvania Supreme Court has noted that a multitude of items may be considered, including: the circumstances under which the statements were uttered, including the custodial/noncustodial aspect of the setting; the identity of the listener; the contents of the statement, including whether the statements minimize the declarant's responsibility or other possible motivations of the declarant such as to lie, curry favor or distort the truth; the nature and degree of the "against interest" aspect of the statement, including the extent to which the declarant understands that making the statement subjects him to criminal liability; the circumstances or events that prompted the statements, including

whether they were made with the encouragement of the listener; the timing of the statement in relation to the events described; the declarant's relationship to the defendant; and any other factors bearing upon the statement's reliability. *Commonwealth v. Robins*, 812 A.2d 514, 525-526 (Pa. 2002). Notably, the use of hindsight or "bootstrapping" based on independent evidence is proscribed. *Id.*

Turning to the case at bar, the statement of Shaurn Thomas falls into the category of hearsay statements surrounded by particularized guarantees of trustworthiness. We note, at the outset, that the introduction of his statement constituted double hearsay. The Commonwealth introduced the prior statement of witness Christopher Young, after Young refused to implicate petitioner on the stand. Young's statement came in under *Commonwealth v. Lively*, 610 A.2d 7 (Pa. 1992), as a prior inconsistent statement, which had been reduced to writing, signed and adopted by him. That statement, however, contained a second hearsay level consisting of Shaurn Thomas's statements to Young regarding the circumstances of the crime. Shaurn's statements were indeed against his penal interest, as he specifically implicated himself in the robbery and subjected himself to felony-murder charges, by identifying his father as the shooter of the victims. While some blame-shifting occurred by Shaurn's pinning the actual shooting on his father, the statement falls well outside the type of statements with which *Lilly* was concerned. Specifically, the record reveals that Shaurn approached Young and that Young was an acquaintance of both Shaurn and his father who had been originally solicited to participate in the crime. Shaurn, thus, had no apparent reason to lie to Young and could not have made the statements to curry any favor with authorities. Although it is possible that Shaurn did not understand that his statements would subject him to criminal liability, it is important to note

that he made the statements spontaneously, at his own behest and without encouragement from anyone. Moreover, there is no dispute that Shaurn had personal knowledge about the crime and that the statement was made shortly after the robbery and shooting, minimizing the likelihood that it was based on faulty recollection. Further, the statement contained no express assertion of past fact, rather merely an indication of regret for the actions of he and his father. Finally, the father-son relationship between petitioner and Shaurn decreases the possibility that Shaurn's statement was a false account in an effort to frame petitioner.

In light of the foregoing, we find that the underlying *Bruton* issue does not have merit. Clearly, the statement bore the requisite indicia of reliability contemplated by *Ohio v. Roberts*, *supra* and reiterated in *Dutton* and its progeny. Consequently, any effort by counsel to exclude Shaurn Thomas's out-of court statement would have likely been met with a denial. As counsel cannot be ineffective for failing to pursue a meritless objection, we decline to find that habeas relief is warranted on this issue.[4]

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[4] Notably, it does not appear that petitioner has satisfied the second *Strickland* prong either. As discussed above, this second prong mandates a showing that the deficient performance prejudiced the defense. Shaurn Thomas's statement implicated both he and his father in the robbery. Nonetheless, Shaurn was acquitted of all charges. Apparently, then, the jury did not attach a great deal of weight to his admission.

C. Ineffective Assistance of Counsel for Failure to Seek Exclusion of an Impermissible Suggestive Witness Identification

Petitioner's next claim contends that counsel improperly failed to pursue a motion to suppress and/or strike two identifications made by Commonwealth witness Peter Fuller -- one made during a photo array and one made during trial. Mr. Fuller testified that while viewing photographic arrays after the incident, he was unable to identify anyone until the detective took out the photograph of petitioner and co-defendant and "suggested" that they were the ones involved. He stated that if the detective had not picked out the defendants' photographs, he "wouldn't have identified them." (N.T. 5/25/94, pp. 139-140, 146). Moreover, although he fingered petitioner at trial, Mr. Fuller could not identify petitioner at the preliminary hearing. Petitioner now asserts that, despite the alleged impermissibly suggestive nature of this identification evidence, trial counsel withdrew the motion to suppress these identifications to the detriment of the defense.

On review of this claim, the Superior Court found that Mr. Fuller did indeed testify that he was unable to identify the perpetrators of the robbery and murder until Detective Piree showed him photographs of petitioner and his co-defendant and strongly suggested that they were guilty of the crimes. Superior Court Opinion (1994), at p. 20. Further, it acknowledged Mr. Fuller's statement that he would never have identified either petitioner or his co-defendant had the detective not picked out their photographs, and that he was unable to identify petitioner at the pre-trial hearing. *Id.* at 20-21. Finally, the Superior Court recognized that Mr. Fuller's concession that prior to trial he remained unsure of who really committed the crimes and that Detective Piree

kept showing him photographs with the expectation that he would implicate someone.

Notwithstanding these findings, the Superior Court held that, based on the course of cross-examination, trial counsel had an obvious trial strategy in not seeking the suppression of Mr. Fuller's identifications. Specifically, it noted that the witness's testimony concerning the circumstances surrounding his pre-trial identification of petitioner's photograph was relevant to the defense strategy of proving that the police were overreaching and framing petitioner for the incident so as to close the books on the matter. Letting the jury hear that Detective Piree coerced the witness into identifying photographs advanced that strategy.

This Court's inquiry into the issue does not allow us to conclude that the state court's opinion was neither contrary to nor an unreasonable application of federal law. The Due Process Clause prohibits the use of identification procedures which are "unnecessarily suggestive and conducive to irreparable mistaken identification." *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972 (1967). In *Simmons v. United States*, 390 U.S. 377 (1968), the United States Supreme Court recognized that the "improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals." *Id.* at 383. If police single out particular photographs or indicate that they have evidence implicating one of the individuals in the photographs, the chance of misidentification is heightened, thereafter reducing the trustworthiness of a subsequent lineup or in-court identification. *Id.* at 383-384. In other words, the Court theorized that a witness, upon being subjected to a suggestive photo array, may retain the image of the suggested perpetrator in his or her mind, making any later identifications potentially inaccurate. *Id.*

Despite its acknowledgment of the hazards inherent in initial identification by photograph, however, the court declined to blanketly prohibit its employment as unconstitutional. *Id.* at 384. Rather, it held that "each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 384.

"[R]eliability is the linchpin in determining the admissibility of identification testimony . . . ." *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977). If, following a suppression hearing, a trial court finds that out-of-court identifications were impermissibly suggestive, it may also exclude the in-court identification, unless an independent basis for that in-court identification exists. *DiAngelo v. U.S.*, 406 F. Supp. 880, 882 (D.C. Pa. 1976), *aff'd*, 566 F.2d 1168 (1977). In *United States v. Higgins*, 458 F.2d 461 (3d Cir. 1972), the Third Circuit Court of Appeals set out seven factors to be considered in determining whether an in-court identification is the product of an independent source:

> (1) the manner in which the pre-trial identification was conducted;
>
> (2) the witness' prior opportunity to observe the alleged criminal act;
>
> (3) the existence of any discrepancies between the defendant's actual description and any

> description given by the witness before the photographic identification;
>
> (4) any previous identification by the witness of some other person;
>
> (5) any previous identification of the defendant himself;
>
> (6) failure to identify the defendant on a prior occasion; and
>
> (7) the lapse of time between the alleged act and the out-of-court identification.

458 F.2d at 465. Although each individual factor is important, the "totality of surrounding circumstances" governs the ultimate determination. *Id.*

In the case at bar, respondent argues that petitioner's ineffective assistance of counsel claim for failure to move to suppress Fuller's in-court identification has no merit on three grounds. First, it claims that for the ineffectiveness claim to succeed, a motion to suppress the in-court identification must itself have had merit -- a fact which remains in dispute due to the conflicting testimony of Mr. Fuller and Detective Piree regarding the circumstances of the out-of-court identification. Second, respondent contends that even if a motion to suppress Fuller's in-court identification could have succeeded, counsel purposely failed to raise such a motion on grounds of sound trial strategy. Finally, respondent asserts that, regardless of whether or not counsel was ineffective, petitioner has failed to prove the second element of *Strickland*, *i.e.* that of prejudice. We find that none of these argument detract from the potential meritorious nature of petitioner's claim.

In its first argument, respondent claims that although Mr. Fuller unequivocally testified as to a suggestive photo array, his testimony was contradicted by Commonwealth witness Detective Jeffrey Piree. Detective Piree testified that Fuller had viewed photographs on three different occasions and did not identify anyone during either of the first two. During the third array, however, Mr. Fuller was shown 24 photographs, including those of petitioner and Shaurn Thomas. This array was the identical one given to Christopher Young a short time prior. According to Detective Piree, Young identified petitioner and Shaurn Thomas as perpetrators and stated, "I believe it is them." The detective denied Fuller's allegation that two photographs were singled out. (N.T. 5/25/94, 216-220). Based on this contradictory testimony, the respondent argues that any claim that a suggestive identification procedure occurred remains very much in dispute.

This argument, however, identifies the very core of the problem which we now face. Had counsel moved, prior to Fuller's testimony, to suppress his potential in-court identification of petitioner, the trial court would have likely held a suppression hearing to consider and resolve the credibility issues between Fuller and Piree. At that juncture, we would have a clear determination as to whether the photographic array was indeed so suggestive as to taint the validity of his in-court identification of petitioner. Counsel, however, never did so. Nor did the PCRA court take the opportunity to hear from each of these witnesses to satisfy itself regarding the constitutionality of the in-court identification. Indeed, neither the PCRA court nor the Superior Court ever even considered the underlying merits of this claim or addressed the constitutionality of the photo array. Consequently, the fact that the suggestive nature of the out-of-court

identification remains in dispute advocates in favor of an evidentiary hearing in this Court to make that determination. *See Campbell v. Vaughn*, 209 F.3d 280, 286-287 (3d Cir. 2000), *cert. denied*, 531 U.S. 1084, 121 S. Ct. 789 (2001) (where the state courts failed to resolve the factual issue on which a habeas petition rests, a new evidentiary hearing would be permitted, as the failure to develop the factual record would not be petitioner's fault).

In a continuation of its first argument, respondent goes on to suggest that even assuming a suppression judge had accepted Mr. Fuller's testimony over that of Detective Piree, the judge might still find Fuller's in-court identification to be admissible. Fuller testified that he viewed petitioner from a distance of six feet as petitioner aimed a gun at him, spoke briefly to him and then shot him. Accordingly, the suppression judge may have concluded that the identification was the product of an independent source and, hence, admissible despite the suggestiveness of the photographic array.

We again, however, decline to make such a ruling absent some factual findings by a decisionmaker who has heard testimony on this issue. It is undeniable that Fuller failed to identify petitioner at the preliminary hearing and specifically stated that he would have been unable to identify him at all had Detective Piree not picked out the two photographs from the array for him. As such, it was quite probable that the final in-court identification based only on Fuller's recollection from the impermissible out-of-court photo array. Certainly, these facts constitute the precise type of situation against which *Simmons* sought to guard.

In a second effort to undermine petitioner's claim, respondent argues that, notwithstanding the merits of the underlying *Simmons* claim, the overriding ineffective

assistance of counsel claim does not have merit since counsel purposely, and acting under clear trial strategy, chose to exploit the circumstances behind Fuller's in-court identification so as to bolster the defense claim of police overreaching. Echoing much of the Superior Court's opinion, respondent contends that "[t]he record plainly establishes that trial counsel intentionally elicited Mr. Fuller's testimony concerning the photographic displays." Response to Petition for Writ of Habeas Corpus, at 36. It asserts that, to undermine the reliability of Mr. Fuller's in-court identification, defense counsel first elicited his failure to identify petitioner at the preliminary hearing and then attempted to discredit the trial identification by portraying it as the product of police overzealousness. Based on the record, respondent asks us to conclude that trial counsel's actions were not the result of incompetence, but rather were well thought out to completely undermine one of the two eyewitnesses.

Absent some factual development of this issue, however, we cannot make such a conclusion. Without the benefit of an evidentiary hearing, the Superior Court found it to be "obvious from the record" that defense counsel purposely allowed admission of the in-court identification so that he could impeach Fuller with the circumstances surrounding his out-of-court identification. This determination was made, however, based on mere speculation.[5] "*Strickland* requires an analysis based on a complete record. The reviewing

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[5] The Pennsylvania Supreme Court has likewise commented on the impracticality of appellate courts being asked to speculate as to the trial strategy of trial counsel in order to rule upon ineffectiveness claims. The Court noted that meaningful appellate review of ineffective assistance of counsel claims is best effected when the trial court first undertakes to develop the record and

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court's reasoning under the first prong needs to be made with an understanding of counsel's thought process . . . so that a conclusion whether counsel was ineffective can be made based on facts of record, rather than on assumptions." *Marshall v. Hendricks*, 307 F.3d 36, 115 (3d Cir. 2002). The Superior Court and respondent assumed that defense counsel performed based on sound trial strategy. As petitioner points out, though, the record also supports a contrary finding that counsel failed to appreciate that he could have had the in-court identification suppressed altogether while still arguing police overreaching. Only after the identification was admitted did counsel use cross-examination to mitigate the damage. In short, we recognize the very real possibility that counsel was, in fact, ineffective for failing to move to suppress and/or strike Mr. Fuller's in-court identification.

While we do not necessarily discredit the Superior Court's speculation as to defense counsel's supposed strategy, we likewise cannot presume it to be correct absent factual findings made after a full and fair evidentiary hearing on the record. To do so would, as petitioner notes, allow a state court to dispose of any *Strickland* claim by just inventing a reasonable basis for any attorney's actions, be it real or not. Where a habeas petitioner "has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court, § 2254 (e)(2) will not preclude an evidentiary hearing in federal court." *Campbell*, 209 F.3d at 287 (quoting *Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998)). As petitioner has never had the opportunity to develop the factual basis of

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engage in the appropriate fact-finding to discern trial counsel's strategy. *Commonwealth v. Grant*, 813 A.2d 726, 733, 736 (Pa. 2002).

this ineffectiveness claim, we find that an evidentiary hearing in this Court is indeed warranted.

In a final effort to diffuse petitioner's ineffectiveness allegation, respondent contends that even assuming arguendo that the out-of-court photo array was impermissibly suggestive and that counsel did not have a reasonable trial strategy for failing to move to suppress the in-court identification, petitioner cannot prove the second *Strickl*and element of prejudice. Again, we cannot agree without further factual inquiry. The remainder of the Commonwealth's case against petitioner consisted of the testimony of Christopher Young and the out-of-court statement by co-defendant Shaurn Thomas. Young initially testified that he did not know who the robbers were, forcing the Commonwealth to introduce his prior inconsistent statement to police that petitioner and his son Shaurn were the perpetrators. Moreover, Young had four felony cases pending during petitioner's trial, lending motivation to his inculpation of petitioner. His credibility was, therefore, already at issue. Shaurn Thomas's statement, while certainly inculpatory of both he and petitioner, was obviously not credited significantly by the jury since it declined to convict Shaurn of any charges. Consequently, we find a reasonable possibility that, but for counsel's unprofessional errors in failing to move to suppress and/or strike Mr. Fuller's in-court identification, the result of the proceeding would have been different. As such, we decline to dismiss the pending habeas petition without further factual inquiry on this issue.

4 [sic]. Ineffective Assistance of Trial Counsel for Failure to Object to Prosecutorial Misconduct

In his final claim, petitioner argues that trial counsel was ineffective for failing to raise and preserve three

instances of prosecutorial misconduct, wherein the Commonwealth attempted to bolster the credibility of certain witnesses.[6] He first alleges that trial counsel did not object

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[6] Petitioner also presents as a substantive claim the underlying issue of prosecutorial misconduct. This claim, however, is procedurally defaulted. Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842, 119 S. Ct. 1728, 1731 (1999). In other words, a petitioner must invoke "one complete round of the State's established review process." *Id.* at 845. In the case of an unexhausted petition, the federal courts should dismiss it without prejudice, otherwise, they risk depriving the state courts of the "opportunity to correct their own errors, if any." *Toulson v. Beyer*, 987 F.2d 984, 989 (3d Cir. 1993). However, "[i]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would not find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas . . ." *Coleman*, 501 U.S. at 735 n.1; *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999). The procedural default barrier, in the context of habeas corpus, precludes federal courts from reviewing a state petitioner's habeas claims if the state court decision is based on a violation of state procedural law that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553, *reh'g denied*, 501 U.S. 1277, 112 S. Ct. 27 (1991).

Petitioner never raised the claims of prosecutorial misconduct, which he now presents for our review, on direct appeal or in his first PCRA petition. Any current attempt by petitioner to file a second PCRA petition raising these claims, however, would unequivocally be deemed untimely. Pursuant to the PCRA statute, "[a]ny petition under this subchapter . . . shall be filed within one year of the date the judgment becomes final . . .," unless petitioner

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when after Young testified the prosecutor asked, "Do you want to be charged with perjury?" In the remaining two instances, he accuses the prosecutor of improperly vouching for a witness when, during closing arguments, the prosecutor stated that the Detective Piree had "solved the murder," and that Young told the truth when he gave his statement to the police. Upon review of the record, we find no basis for granting habeas relief.

Under the law as set forth by the United States Supreme Court, a petitioner seeking the writ of habeas corpus will not succeed merely because the prosecutors' actions "were undesirable or even universally condemned." *Darden*

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proves that he was either prevented by government officials from raising the claims, the facts upon which the claims are based were previously unknown, or the right asserted is a newly-recognized constitutional right. 42 Pa.C.S.A. § 9545(b) (1998). Petitioner's judgment became final on June 5, 1998 thirty days after the Superior Court denied his direct appeal. *See* 42 Pa.C.S.A. § 9545(b)(3) (judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.). The Pennsylvania Supreme Court has conclusively established that the one-year statute of limitations acts as a jurisdictional bar and is not subject to equitable tolling. *Commonwealth v. Fahy*, 737 A.2d 214, 222 (Pa. 1999). Because petitioner cannot now return to the Pennsylvania courts, as the limitations period has lapsed, the unexhausted claims become procedurally defaulted for purposes of habeas review.

During PCRA proceedings, however, the Superior Court addressed these claims under the guise of ineffective assistance of counsel for failure to raise the prosecutorial misconduct claim. We, in turn, address them in the same fashion.

v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, *reh'g denied*, 478 U.S. 1036, 107 S. Ct. 24 (1986) (quotations omitted). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 947 (1982). Thus, to state a claim for habeas relief based upon comments at trial by the prosecutor, a petitioner must show that the prosecutor's comments were so egregious that they fatally infected the proceedings, rendered the entire trial fundamentally unfair, and made the conviction a denial of due process. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871 (1974); *Lesko v. Lehman*, 925 F.2d 1527, 1546 (3d Cir.), *cert. denied*, 502 U.S. 898, 112 S. Ct. 273 (1991). Where an error occurs, the inquiry then becomes whether, in light of the record as a whole, the prosecutor's conduct "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S. Ct. 1710, 1722 (1993), *reh'g denied*, 508 U.S. 968, 113 S. Ct. 2951 (1993).

Petitioner's first allegation of prosecutorial misconduct involves a question posed to Commonwealth witness Young during direct examination. During his testimony, Mr. Young asserted, contrary to the second signed statement he had given to police, that he did not see co-defendant Shaurn Thomas at the scene of the crime. In an obvious attempt to have Young repeat the inculpatory statements he had previously given to police, the prosecutor asked, "Do you want to be charged with perjury?" (N.T. 5/24/94, p. 30). Immediately thereafter, co-defense counsel objected to the statement and the court sustained. The prosecutor withdrew his question and no further perjury comment was made. *Id.*

Upon review of the PCRA court's determination of this issue, the Superior Court stated that "[t]he prosecutor's question fell within the 'rhythm' of the language used by the witness and constituted a fair response to Mr. Young changing his story from the last statement he gave to police. Moreover, there was no need for trial counsel to object to this question since counsel for co-defendant did so. . ." Superior Court Opinion (2001), at p. 24. The Superior Court went on to state that because the prosecutor questioned Young extensively regarding his various statements and he was subject to cross-examination, re-direct and re-cross on all of these points, "[t]he jury was not left to speculate on the truth of the witness's arguments; they were fully apprised of the facts they needed to make their own credibility determination." Superior Court Opinion (2001), at p. 24.

This ruling is neither contrary to nor an unreasonable application of federal law. While perhaps identifying an improper remark by the prosecutor to which counsel could have objected, petitioner has failed to satisfy the prejudice prong of the *Strickland* standard on several fronts. First, the prosecutor's comment constituted merely an effort to prompt the witness to reiterate his prior inculpatory statement or to indicate to the jury that the witness had previously made a different report as to what he saw at the crime scene. While his method was perhaps improper, he was nonetheless able to obtain that precise objective by his extensive questioning of the witness on the previous statements. In turn, defense counsel was able to cross-examine the witness on the veracity of both his testimony and his prior report to police. Consequently, as noted by the Superior Court, the prosecutor's fleeting comment regarding perjury did not deprive the jury of its opportunity to determine the credibility of the witness on its own. Moreover, immediately after the prosecution asked the improper question, co-defense counsel lodged an

objection, which the court sustained. No further comment on the subject was made. As such, any attempt by petitioner's counsel to make the identical objection, far from changing the outcome of the trial, would have been merely repetitive.

The second two instances of alleged prosecutorial misconduct, to which trial counsel failed to object, involved what petitioner has termed improper bolstering of witnesses' credibility. Specifically, while discussing Detective Piree's testimony during closing argument, the prosecution commented as follows:

> Piree told, you know, he [Christopher Young] was not a suspect. Piree did good police work. He reasoned like this; son, we know you were there when it happened and we know you know who did it. We know they came in behind you. We know that you were friendly with the doers. People will think you had something to do with this.
>
> Piree said I did not ever consider him a suspect. When you use that leverage to pry from this kid the truth, it fits. Now, is that not good police work? *He solved the murder.* According to the evidence, the murderers are sitting right there in front of your face.

(N.T. 5/26/94, p. 82). In addition, while addressing Christopher Young's conflicting statements to police and on the witness stand, the prosecutor argued:

> That makes perfect sense, perfect sense to you, as you sit there and listen to the twenty-year-old kid off the corner. If I tell them I

> knew, I am involved, they will think for sure, as sure as you are sitting here, that I had something to do with it; that I see Harry James up and got the old man killed.
>
> So he said in his statement, he said everything but who did it. He told the truth. He just left out that it was Clayton Thomas and Shaurn Thomas.

(N.T. 5/26/94, p. 80). Petitioner now contends that these two comments constituted unconstitutional vouching for the credibility of the Commonwealth witnesses.

The Superior Court rejected this precise claim. With respect to the reference to Detective Piree "solv[ing] the murder," the court noted that, when viewed in context, "the prosecutor's remark constituted a fair and proper comment on the evidence adduced at trial concerning Mr. Young's allegations that he was coerced by Detective Piree to fabricate evidence for the police." Superior Court Opinion, at p. 25. Moreover, it found that the prosecutor would have been deficient had he not attempted to convince the jury that Detective Piree was a reliable witness who had followed sound investigative tactics. With respect to the reference to Young telling the truth, the court remarked that the prosecutor's comment was a reasonable response to defense attempts to characterize the second statement Mr. Young gave the police as unreliable and coerced. More specifically, the court found that "the prosecutor was not improperly offering his personal opinion on the veracity of this witness. Rather, he was discussing the contradictory versions of events proffered by the witness, and commenting on Mr. Young's motivation to tell the truth the second time he was interviewed by police." Superior Court Opinion, at p. 27.

Again, we find no basis upon which to disagree with the state court ruling. "A prosecutor may not try to bolster his case by vouching for the credibility of a government witness." *United States v. Dispoz-O-Plastics, Inc.*, 172 F.3d 275, 283 (3d Cir. 1999). "Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury." *United States v. Walker*, 155 F.3d 180, 184 (3d Cir. 1998). The Third Circuit has held that in order to find vouching, two criteria must be met: "(1) the prosecutor must assure the jury that the testimony of a Government witness is credible; and (2) this assurance is based on either the prosecutor's personal knowledge, or other information not contained in the record." *Id.* at 187. "Thus it is not enough for a defendant on appeal to assert that the prosecutor assured the jury that a witness' testimony was credible. The defendant must be able to identify as the basis for that comment an explicit or implicit reference to either the personal knowledge of the prosecuting attorney or information not contained in the record." *Id.* The Third Circuit distinguishes between expressions of personal opinion based on the evidence and those based on facts not in evidence. *Dispoz-O-Plastics*, 172 F.3d at 28; *United States v. Beaty*, 722 F.2d 1090, 1097 (3d Cir. 1983). "Where a prosecutor argues that a witness is being truthful based on the testimony given at trial, and does not assure the jury that the credibility of the witness based on his own personal knowledge, the prosecutor is engaging in proper argument and is not vouching." *Walker*, 155 F.3d at 187.

Considering the two challenged comments in context, we do not find that any vouching occurred. The prosecutor, in both instances, was merely seeking to prove that each witness was truthful based on the evidence at trial. The

comment regarding Detective Piree merely attempted to show that he had been using good police investigatory tactics. With respect to the comment regarding Young, the prosecutor was try to prove only that Young had motivation, as shown by other evidence, to tell the truth to the police. At no point did the prosecutor express his personal opinion as to the credibility of these witness. As the prosecution's closing statement was well within constitutional bounds, counsel had no basis upon which to challenge its propriety. We, therefore, deny petitioner's claim as meritless.

IV. CONCLUSION

Having thoroughly considered the opposing arguments, this Court finds that petitioner's first and third ineffectiveness offer no basis upon which to grant habeas relief. His second claim, however, raises some specter of doubt, thereby prompting us to grant an evidentiary hearing wherein we may resolve some underlying factual issues. We reserve recommending judgment on the remaining two claims until after the conclusion of the evidentiary hearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAYTON THOMAS, Petitioner	:	CIVIL ACTION
VS.	:	
BEN VARNER, AND THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, AND THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents	:	NO. 02-4778

ORDER

FILED: June 10, 2003

AND NOW, this 10th day of June, 2003, IT IS HEREBY ORDERED that an evidentiary hearing is granted with respect to petitioner's claim of ineffective assistance of counsel for failure to move to suppress Fuller's in-court identification. The parties shall appear on Monday, July 14, 2003, at 10:00 a.m., in a Courtroom to be provided.

It is so ORDERED.

BY THE COURT:

/s/
CHARLES B. SMITH
UNITED STATES
MAGISTRATE JUDGE

J. S47011/01

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
CLAYTON THOMAS, Appellant	:	No. 2134 EDA 2000

Appeal from the Order entered June 27, 2000, in the Court of Common Pleas of Philadelphia County, Criminal, at Nos. 5255, 5263 March Term, 1993.

BEFORE: HUDOCK, FORD ELLIOTT and OLSZEWSKI, JJ.

MEMORANDUM: FILED DEC. 12, 2001

This is an appeal from an order denying relief pursuant to the Post Conviction Relief Act (PCRA). 42 Pa.C.S.A. §§ 9541-46. We affirm.

In 1994, Appellant (also known as Blue or Mr. Blue) and his son, Shaurn Thomas, were jointly tried on charges of second degree murder, robbery, aggravated assault and possessing an instrument of crime.[1] The charges stemmed from the robbery of a speakeasy located in the City of Philadelphia. Accompanied by a person who acted as lookout, Appellant entered the speakeasy brandishing a firearm and ordered the occupants to the floor. The proprietor of the establishment, Harry James, had been playing chess with a

[1] 18 Pa.C.S.A. §§ 2502(b), 2702 and 907, respectively.

customer, Peter Fuller. Mr. James was fetching a beer for another customer when Appellant arrived. Instead of complying with Appellant's order, Mr. James leaped at Appellant and began to struggle with him. During the course of this altercation, Appellant shot Mr. James in the chest. The victim subsequently died of his wound. Appellant also shot Mr. Fuller in the shoulder. Mr. Fuller survived.

A jury convicted Appellant on all counts. However, Appellant's son was acquitted of all charges. The Honorable Jane C. Greenspan sentenced Appellant to the mandatory sentence of life imprisonment for second-degree murder, with no additional penalty for the remaining convictions.

Appellant did not file a timely notice of appeal from the judgment of sentence. Nevertheless, the trial court granted Appellant's *pro se* PCRA petition requesting the reinstatement of direct appeal rights *nunc pro tunc*. The trial court appointed new counsel to represent Appellant on direct appeal. On May 5, 1998, this Court affirmed the judgment of sentence pursuant to the appeal *nunc pro tunc*. ***Commonwealth v. Thomas***, 718 A.2d 862 (Pa. Super. 1998) (unpublished memorandum). There is no indication of record that Appellant pursued a petition for allowance of appeal with the Pennsylvania Supreme Court.

On April 3, 1999, Appellant filed a timely *pro se* PCRA petition. The PCRA court properly treated this as a first PCRA petition and appointed new counsel to represent Appellant. Counsel filed an amended petition followed in December of 1999 by a supplemental amended petition. On April 17, 2000, the Commonwealth filed a motion to dismiss Appellant's PCRA petition without a hearing. The PCRA court provided Appellant with notice on April 20, 2000, of its intent to dismiss the petition pursuant to Rule of Criminal

Procedure 1507 (now renumbered as Rule 907). The PCRA court entered an order denying relief on June 27, 2000. Appellant's timely notice of appeal followed on July 17, 2000. The PCRA court did not require Appellant to file a Rule 1925(b) statement. Therefore, no issues are waived pursuant to ***Commonwealth v. Lord***, 553 Pa. 415, 420, 719 A.2d 306, 309 (1998).

Appellant's "Statement of Questions Presented" identifies only three issues. ***See*** Appellant's Brief at 3. Nevertheless, the present appeal actually sets forth ten separate claims for our consideration, all of which are inadequately identified by his "Statement of Questions Presented" but colorably subsumed therein. The claims actually argued comprise the following seventeen issues and sub-issues:

> I. Trial counsel rendered ineffective assistance in failing to object to the unredacted confession of the non-testifying co-defendant and, in the alternative, in failing to seek a cautionary instruction limiting the jury's consideration of this evidence.
>
> II. Trial counsel was ineffective in failing to impeach primary witness Christopher Young with relevant aspects of his criminal record.
>
> III. The trial court erred in refusing to charge the jury on voluntary manslaughter as there was substantial evidence that the shooting itself was provoked.
>
> IV. Trial counsel rendered ineffective assistance in failing to object to inadmissible

hearsay testimony implicating [Appellant] and which contradicted the trial testimony of the declarant himself.

V. The jury was erroneously permitted to draw a negative reference regarding [Appellant's] exercise of his privilege against self-incrimination as a result of inadmissible Commonwealth evidence and trial counsel's failure to interpose the proper objection to this evidence, in violation of the fifth, sixth and fourteenth amendments of the United States Constitution and the corresponding provisions of the Pennsylvania Constitution.

VI. Appellant was unfairly convicted on the strength of an unreliable and overly suggestive identification.

VII. The trial prosecutor repeatedly engaged in misconduct throughout the trial by improperly vouching for the credibility of Commonwealth witnesses and "testifying" to facts that were not in the record.

VIII. Appellant's right to a fair trial was denied because the trial court failed to give, and trial counsel failed to request, a cautionary instruction following the introduction of "other crimes" evidence.

IX. Appellant's right to a fair trial was denied because the trial court failed to give, and trial counsel failed to request, an

> accomplice instruction regarding [Commonwealth] witness Christopher Young.
>
> X. The trial court erred in giving a "progression" or "acquittal first" charge instructing the jury that it could not consider any lesser offense unless it unanimously concluded that [Appellant] was not guilty of the greater offense, thereby depriving [Appellant] of his state and federal constitutional rights to due process.

Appellant's Brief at i-ii. Counsel for Appellant complains that he would have preferred to state the issues "separately and in a more intelligible fashion" than he was able to do in the "Statement of Questions Presented"' in light of the dictates of Rule of Appellate Procedure 2116(a). ***Id.*** at 3 n.1. We find it unhelpful for counsel to pretend compliance with the rule while in actuality evading its import. We caution counsel that this Court may quash or dismiss an appeal based upon substantial failure to comply with the Pennsylvania Rules of Appellate Procedure. ***Winpenny v. Winpenny***, 775 A.2d 815, 817 n.1 (Pa. Super. 2001). ***See also Commonwealth v. Hunter***, 768 A.2d 1136, 1139 (Pa. Super. 2001) (appellate advocacy is measured by effectiveness, not "loquaciousness") (quoting Aldisert, R.). Because this appeal stems from the imposition of a life sentence pursuant to a conviction for first-degree murder, we shall not penalize Appellant for counsel's procedural default. We shall exercise our discretion and consider the merits of the claims as they actually have been raised in the table of contents and argued in the body of Appellant's brief.

When examining a post-conviction court's grant or denial of relief, we are limited to determining whether the

court's findings were supported by the record and whether the court's order is otherwise free of legal error. ***Commonwealth v. Quaranibal***, 763 A.2d 941, 942 (Pa. Super. 2000). We will not disturb findings that are supported in the record. ***Id.*** The PCRA provides no absolute right to a hearing and the post-conviction court may elect to dismiss a petition after thoroughly reviewing the claims presented and determining that they are utterly without support in the record. ***Id.***

Several of Appellant's issues implicate the alleged ineffectiveness of trial counsel and the concomitant ineffectiveness of appellate counsel for failing to raise and preserve these issues on direct appeal. A claim of ineffectiveness must be raised at the earliest possible stage in which the allegedly ineffective counsel no longer represents the petitioner. ***Commonwealth v. Allen***, 557 Pa. 135, 143, 732 A.2d 582, 587 (1999). However, a properly layered argument alleging the ineffectiveness of all prior counsel for failing to preserve ineffectiveness claims is sufficient to avoid a finding of waiver. ***Id.*** Appellant's contentions with regard to the purported ineffectiveness of all prior counsel have been sufficiently developed to preclude a finding of waiver. ***See Commonwealth v. Williams***, 2001 Pa. Lexis 2283 (Pa. October 19, 2001) (explicating the requirements of a layered ineffectiveness claim); ***Commonwealth v. Marrero***, 561 Pa. 100, 103, 748 A.2d 202, 204 (2000) (the same). We shall, therefore, address Appellant's arguments.

When a petitioner alleges trial counsel's ineffectiveness in a PCRA petition, he must prove by a preponderance of the evidence that his conviction or sentence resulted from ineffective assistance of counsel "which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. § 9543(a)(2)(ii).

Commonwealth v. Stevens, 559 Pa. 171, 180, 739 A.2d 507, 512 (1999). Our Supreme Court has interpreted this provision in the PCRA to mean that the petitioner must show: (1) that his claim of counsel's ineffectiveness has merit; (2) that counsel had no reasonable strategic basis for his action or inaction; and (3) that the error of counsel prejudiced the petitioner, *i.e.*, that there is a reasonable probability that, but for the error of counsel, the outcome of the proceeding would have been different. ***Id.*** (citing ***Commonwealth v. Kimball***, 555 Pa. 299, 312-13, 724 A.2d 326, 333 (1999)). Pennsylvania law presumes that counsel is effective, and it is the burden of Appellant to show otherwise. ***Id.*** at 180-81, 739 A.2d at 512.

An allegation of ineffectiveness of counsel cannot be established without a finding of "prejudice." ***Commonwealth v. March***, 528 Pa. 412, 416-17, 598 A.2d 961, 963 (1991). "Prejudice" in the context of an ineffectiveness claim is determined by an evaluation of whether "but for the arguably ineffective act or omission there is a reasonable probability that the result would have been different." ***Commonwealth v. Petras***, 534 A.2d 483, 485 (Pa. Super. 1987). ***See Commonwealth v. Douglas***, 537 Pa. 588, 596-97, 645 A.2d 226, 230 (1994) (re "but for" causation). ***See also Commonwealth v. Cox***, 556 Pa. 368, 382-383, 728 A.2d 923, 929-30 (1999), *cert. denied*, ___ U.S. ___, 121 S.Ct. 2246, 150 L.Ed.2d 233 (2001) (to prove prejudice, a defendant must show that counsel's ineffectiveness was of such magnitude that the verdict would have been different absent counsel's alleged ineffectiveness). Counsel can never be deemed ineffective for failing to raise a meritless claim. ***Commonwealth v. Roberts***, 545 Pa. 460, 465, 681 A.2d 1274, 1276 (1996); ***Commonwealth v. Rompilla***, 539 Pa. 499, 510, 653 A.2d 626, 631 (1995).

Trial counsel's strategic decisions cannot be the subject of a finding of ineffectiveness if the decision to follow a particular course of action was reasonably based and was not the result of sloth or ignorance of available alternatives. ***Commonwealth v. Collins***, 519 Pa. 58, 65, 545 A.2d 882, 886 (1988) (cited with approval by ***Commonwealth v. Hall***, 549 Pa. 269, 297, 701 A.2d 190, 204 (1997)). Counsel's approach must be "so unreasonable that no competent lawyer would have chosen it." ***Commonwealth v. Ervin***, 766 A.2d 859, 862-63 (Pa. Super. 2000). Furthermore, counsel's effectiveness cannot be evaluated in hindsight but must be examined in light of the circumstances as they existed at the pertinent time. ***Commonwealth v. Hardcastle***, 549 Pa. 450, 464, 701 A.2d 541, 547 (1997).

Appellant first argues that trial counsel was ineffective in failing to object to the admission of the unredacted confession of Shaurn Thomas, Appellant's son and co-defendant. Despite the implication created by the manner in which the argument is couched, the Commonwealth did not introduce a confession given to the police. Rather, the Commonwealth introduced two hearsay statements attributed to the co-defendant by Commonwealth eyewitness Christopher Young. (The witness is also known as Christopher Dinwiddie, and the record reflects this fact in various places.)

The evidence adduced at trial established that, when first interviewed by the police, Mr. Young stated he could not identify the perpetrators of the robbery and murder at the speakeasy. However, in a second interview, Mr. Young told a detective that Appellant and Shaurn were the perpetrators. At trial, Mr. Young initially denied that this identification was accurate and stated that the police threatened to pin the murder on him if he did not say what they wanted to hear concerning Appellant's guilt. Later in his testimony,

however, Mr. Young averred that he did observe Appellant shoot the victim. ***See*** N.T., 5/25/94, at 28-43, 58-76, 77-81, 82-93, 95-96, 99-102, 104-108) (testimony of Christopher Young).

In response to the discrepancies and inconsistencies between the witness's two pre-trial statements and the divergence of his trial testimony from the second pre-trial statement, the Commonwealth introduced the signed statement Mr. Young provided to the police on January 18, 1993. After hearing argument on the matter, the trial court admitted this evidence pursuant to ***Commonwealth v. Lively***, 530 Pa. 464, 610 A.2d 7 (1992). N.T., 5/25/94, at 170-190. In ***Lively***, our Supreme Court held as follows:

> [A] prior inconsistent statement may be used as substantive evidence only when the statement is given under oath at a formal legal proceeding; or the statement had been reduced to a writing signed and adopted by the witness; or a statement that is a contemporaneous verbatim recording of the witness's statements.

530 Pa. at 471, 610 A.2d at 10. A prior inconsistent statement of a non-party witness that has been reduced to writing and signed by the declarant is admissible as substantive evidence under ***Lively***. ***Commonwealth v. Fletcher***, 561 Pa. 266, 293 n.19, 750 A.2d 261, 275 n.19 (2000), *cert. denied*, 531 U.S. 1035 (2000).

In the present case, Detective Jeffrey Piree, the officer who took Mr. Young's statement, testified that the document admitted at trial comprised an accurate contemporaneous record of the questions asked and of the witness's responses.

N.T., 5/25/94, at 165. Moreover, the detective testified that Mr. Young reviewed the statement and signed the document in his presence. ***Id.*** at 164-65. We conclude that the trial court's decision to permit the Commonwealth to adduce this evidence was congruent with our Supreme Court's ruling in ***Lively***.

However, Appellant objects to the fact that Mr. Young's statements to the police were not redacted prior to their admission to remove hearsay imputed to Appellant's son, which referenced Appellant's role in the robbery and shooting. The remarks to which Appellant now objects, framed in their proper context, are as follows:

> We all drove up to Peachy's [Young's girl-friend's] house and went inside. Sheila was inside watching hers and Peachy's kids. Blue [Appellant] was there in the house. He is Shaurn's father. Blue, Shaurn's father, is in his mid-40's. I guess Blue got bad skin on his face. He and Shaurn got real dark skin and Shaurn and his dad both got short, black, beady hair.
>
> She [Peachy] still wants to argue with me about the other girls I see. I told her I don't want to hear it.
>
> Then I said I am leaving and Blue, Shaurn's father, said to me do you get paid, and I said get what? What do you mean? He said, pull stickups. I said, no, I ain't into that. Then Peachy said to me, don't get involved.

Question: Who was present when Blue said this to you?

Answer: Me, Peachy, Shaurn, Sheila, Wanda and Blue.

Question: Continue.

Answer: I was starting to leave out and Blue said Mr. Harry got a speak down where you live. He said we can get paid off of that. I said, no, I am not into stickups. **Then Shaurn said to his father, no dad, people know me down there by Mr. Harry's speakeasy**.

Then I just walked out and I walked over Stiles Street to 31st Street and right on 31st Street. My house is only two houses past Mr. Harry's and I wasn't stupid enough to try to rob somebody two houses from me. I been to Mr. Harry's several time[s] and even Shaurn knew I knew Mr. Harry.

N.T., 5/25/94, at 176-178 (quotation marks omitted, emphasis added).

Initially, we note that the hearsay statement Appellant challenges does not clearly refer to Appellant's co-defendant as the person who was known at Mr. Harry's. When the statement is read in context, it appears that the witness may have used the word "me" to refer to himself, and that the challenged statement means that people at Mr. Harry's knew the witness, not that they knew Shaurn. This interpretation is bolstered by Mr. Young's subsequent remark that he believed

Appellant and Shaurn abandoned the plan to rob the speak-easy because Shaurn also was known there: "I thought it was ended when I said, no and Shaurn told Blue, no. People down there know him too." N.T., 5/25/94, at 182. If the challenged statement is interpreted as referring to the witness and not to Shaurn, trial counsel would have had no reason to object because it constituted neither a confession nor an inculpatory statement that implicates Appellant.

Appellant also objects to a statement attributable to Mr. Young that refers to remarks allegedly made by Shaurn after the robbery. In response to Detective Piree's query as to whether Appellant and Shaurn ever gave anything to Mr. Young, the witness provided the following answer:

> No. They never even said how much they got and I never asked, but a couple days later, I seen or talked to Shaurn when he called me at Peachy's house and he told me it was stupid for him and his dad to rob Harry and wrong for his dad to have shot Harry and Pete.

N.T., 5/25/94, at 185. Appellant contends that this statement should have been redacted to remove the reference to Shaurn's "dad."

The PCRA court considered this argument and deemed it meritless with regard to both challenged statements because trial counsel possessed an identifiable and reasonable strategic basis for wanting these statements to be admitted. The PCRA court found that the challenged remarks bolstered the defense contention that Mr. Young fabricated evidence because the police threatened to charge him with murder unless he identified Appellant as the killer. PCRA Court Opinion, 6/27/00, at 2. As the trial court aptly noted,

this defense theory was a "leitmotif" of the entire trial. ***Id.***, at n.2.

Indeed, Mr. Young himself testified that he only told the police what they wanted to hear, and that he did so because Detective Piree told him he would "go down" for the murder and robbery unless he gave them Appellant. ***See*** N.T., 5/25/94, at 27, 29, 37, 39-40, 43, 77-80, 92, 95-96 (Mr. Young's testimony regarding police coercion). The witness explicitly stated that at one point he was arrested and ***Mirandized***, and that it was safer to lie and provide all the evidence the police wanted than it was to persist in telling the truth, *i.e.*, that Appellant did not commit the crimes charged. ***Id.*** at 29, 40. Mr. Young also stated that the police left him alone once he had identified Appellant as the killer. ***Id.*** at 43.

Detective Piree's testimony corroborated Mr. Young's averments in certain particulars. For example, although the detective stated that at one time Mr. Young "[c]ould have possibly been a suspect" in the case, the witness was not given the ***Miranda*** warnings[2] before he gave his first statement to the police. N.T., 5/25/94, at 162-63. Detective Piree averred that Mr. Young was never placed under arrest. ***Id.*** at 163. Nevertheless, the detective admitted that the second time Mr. Young was interviewed, he personally administered the ***Miranda*** warnings to the witness before taking his statement. ***Id.***

During closing argument, counsel for Appellant's co-defendant emphasized Mr. Young's testimony that he was threatened by the police with arrest for the robbery and murder unless he identified Appellant and Shaurn Thomas as the perpetrators. N.T., 5/26/94, at 42-43. Furthermore, counsel

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[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

contended that the entirety of the second statement given to the police obviously was coerced, including the hearsay statements allegedly uttered by Shaurn Thomas. Counsel noted that Mr. Young was not given the ***Miranda*** warnings the first time he was interviewed by the police. However, he was ***Mirandized*** prior to giving any information at the second interview. Counsel highlighted the fact that providing the warnings to Mr. Young indicated that the witness had indeed been threatened with arrest and was likely to have said anything the police wanted in order to avoid being charged with a crime he did not commit. N.T., 5/26/94, at 45-47, 55-57. Co-defendant's counsel also argued that Mr. Young's first statement, taken immediately after the crimes occurred, was inherently more trustworthy than his later account, which was entirely devised to assuage the police and get them to leave him alone. ***Id.*** at 49-50, 51-53.

Trial counsel followed the same line of argument during closing. He particularly emphasized Mr. Young's fear of the police and his motivation to lie to appease them with any details they might find helpful. ***Id.*** at 65-66. Moreover, trial counsel mocked the quality of Mr. Young's fabrication and tried to demonstrate how extremely implausible the assertions were in the second statement the witness gave to the police. ***Id.*** at 71-72, 74-75.

In the present case, we have scrutinized the entire certified record and find that it supports the PCRA court's conclusion as to trial counsel's evident strategy. Mr. Young was a major Commonwealth witness who was at the scene of the robbery and murder. If trial counsel had succeeded in convincing the jury that the witness's testimony was entirely fabricated to prevent his own arrest, the jury might well have acquitted Appellant on all charges. To this end, it was reasonable to permit Mr. Young's testimony to come in without

objection and then to highlight all the inconsistencies and implausible details contained therein.

Thus, although the strategy was unsuccessful, trial counsel's approach was not so unreasonable that no competent lawyer would have chosen it. ***See Ervin***, 766 A.2d at 862-63. Ineffectiveness cannot be evaluated in hindsight but must be examined in light of circumstances as they existed at the pertinent time. ***Hardcastle***, 549 Pa. at 464, 701 A.2d at 547. If any reasonable basis for counsel's strategy is apparent of record, appellate courts will not find ineffectiveness. ***See, e.g., Fletcher***, 561 Pa. at 292-93, 750 A.2d at 275. We agree with the PCRA judge's assessment of trial counsel's strategy, and we affirm her decision on this issue.

Appellant also contends that trial counsel was ineffective for failing to request a cautionary instruction concerning Mr. Young's testimony. Present counsel represented Appellant before the PCRA court. This aspect of Appellant's argument was not raised below in any form. Nor has the PCRA judge addressed it in her opinion. The claim is, therefore, waived. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a).

Appellant next argues that trial counsel was ineffective for failing to impeach Mr. Young with relevant aspects of the witness's criminal record. The initial problem with Appellant's position is that he has failed to verify properly the factual averments that support the claim. The Pennsylvania Rules of Criminal Procedure require a PCRA petitioner to explain the facts supporting each ground for relief advanced and to provide either citations to the certified record, or to supplement the certified record with affidavits, documents, and additional evidence that otherwise does not appear of

record in support of each factual averment. Pa.R.Crim.P. 902(A)(12)(a) & (b) (formerly enumerated as Rule 1502). In the present case, the certified record lacks documentation that substantiates Appellant's averments concerning Mr. Young's alleged criminal record.

In support of this claim, Appellant has appended to his brief copies of documents purporting to comprise Mr. Young's criminal record. These documents do not appear in the certified record. Consequently, for the purposes of this appeal, they do not exist and we cannot consider them in resolving this issue. The Superior Court must decide cases on the basis of facts of record and not on allegations in a party's appeal brief. ***Commonwealth v. Nelson***, 567 A.2d 673, 676 (Pa. Super. 1989). ***See Commonwealth v. Bracalielly***, 540 Pa. 460, 475, 658 A.2d 755, 763 (1995) (appellate courts may consider only facts duly certified in the record on appeal; an item does not become part of the certified record by simply copying it as part of the reproduced record).

Because the certified record contains no copy of Mr. Young's criminal record, we are unable to ascertain whether Appellant's claim has any basis in fact. "For the purposes of appeal, it is the responsibility of the appellant to offer a complete record for our review." ***Commonwealth v. Hayes***, 755 A.2d 27, 34 (Pa. Super. 2000), *appeal denied*, ___ Pa. ___, 766 A.2d 1244 (2001) (quoting ***Commonwealth v. Lassen***, 659 A.2d 999, 1008 (Pa. Super. 1995)). It is, moreover, Appellant's responsibility to demonstrate counsel's ineffectiveness, not the duty of the Commonwealth to refute the allegation. ***See Stevens***, 559 Pa. at 180-81, 739 A.2d at 512 (Pennsylvania law presumes that counsel was effective and it is the appellant's burden to show otherwise). A claim is waived when our review depends on materials not present in

the certified record. ***Hayes***, 755 A.2d at 35. In the instant case, we are utterly without the means to evaluate Appellant's claim.

Appellant next complains that appellate counsel was ineffective for failing to raise the trial court's error in refusing to charge the jury on voluntary manslaughter. It is well established that a voluntary manslaughter instruction is warranted only when that offense is at issue and the evidence would support such a verdict. ***Commonwealth v. Ragan***, 560 Pa. 106, 119, 743 A.2d 390, 396 (1999). The PCRA court concluded that the evidence adduced at trial did not in any way support a voluntary manslaughter charge:

> This was not a voluntary manslaughter case; to the contrary, it was either a first degree murder[3] or a felony murder. The evidence established the victim was shot in the chest from point blank [range]. Thus, voluntary manslaughter was not a proper verdict.
>
> Read as a whole (or individually) this Court's charge was both fair and an accurate statement of the law. ***Commonwealth v. Prosdocimo***, 525 Pa. 147, 578 A.2d 1273 (1990).
>
> ---
>
> [3] The jury was appropriately death qualified. That the district attorney abandoned an effort to have the jury consider death cannot invalidate the propriety of death qualification here.

PCRA Court Opinion, 6/27/00, at 3. We have examined the certified record carefully, and we find that it supports the

PCRA court's determination concerning the propriety of the jury charge as given, as well as the conclusion that a voluntary manslaughter charge would have been improper. We therefore affirm the PCRA court's ruling on this issue.

Appellant's fourth issue is that trial counsel was ineffective for failing to object to the hearsay testimony of Detective Piree that Mr. Young identified both Appellant and his co-defendant during a photographic identification session. However, Pennsylvania law is clear that a police officer may testify concerning acts of pre-trial identification by a witness, and this evidence is admissible if the identifying witness is present in court and is subject to cross-examination. ***Commonwealth v. Ly***, 528 Pa. 523, 533, 599 A.2d 613, 618 (1991); ***Commonwealth v. Ballard***, 501 Pa. 230, 233, 460 A.2d 1091, 1092 (1983). As already discussed in great detail, Mr. Young testified at Appellant's trial and was subjected to rigorous cross-examination by both trial counsel and counsel for Appellant's co-defendant. Under these circumstances, it was not error for the trial court to permit Detective Piree to testify about the identification procedures employed in the case. Thus, it would have been useless for trial counsel to object to the admission of proper evidence. Counsel cannot be deemed ineffective for failing to pursue a meritless claim. ***Roberts***, 545 Pa. at 465, 681 A.2d at 1276. Appellant is not entitled to relief on this issue.

Appellant's fifth argument is that trial counsel was ineffective for failing to object to testimony that Mr. Young was advised of his ***Miranda*** rights before giving a statement to Detective Piree. This is a meritless claim. As already discussed, trial counsel's strategy was to demonstrate that Mr. Young fabricated evidence so he would not be arrested for the robbery and murder. It materially advanced this strategy for the jury to know that Detective Piree administered

Miranda warnings before questioning the witness a second time. The fact that he was given these warnings gave color to Mr. Young's averment that he thought the police were going to arrest him. If any reasonable basis is apparent of record for counsel's strategy, appellate courts will not find ineffectiveness. ***Fletcher***, 561 Pa. at 292-93, 750 A.2d at 275. We have already concluded that trial counsel's strategy was reasonable. Thus, we can grant no relief on this issue.

We are cognizant of Appellant's argument that because Mr. Young was apprised of his ***Miranda*** rights and chose to testify, it necessarily follows that the jury would conclude Appellant also must have been apprised of his ***Miranda*** rights and yet refused to testify. We find this allegation to be both illogical and unfounded. As noted, we have scrutinized the entire certified record in this case. No improper reference to Appellant's right to remain silent was presented to the jury. Trial counsel was not ineffective for failing to object to the admission of evidence that bolstered the defense strategy and that in no way called into question Appellant's exercise of his constitutional right to remain silent. ***See Roberts***, 545 Pa. at 465, 681 A.2d at 1276 (counsel cannot be deemed ineffective for failing to pursue a meritless claim).

Appellant next complains that all prior counsel were ineffective for failing to seek suppression of a suggestive pre-trial identification by Peter Fuller and for failing to challenge the introduction of the witness's identification at trial. As Appellant correctly notes, Mr. Fuller testified that he was unable to identify the perpetrators of the robbery and murder until Detective Piree showed him photographs of Appellant and his co-defendant and strongly suggested that they were guilty of the crimes. Moreover, the witness stated that he would never have identified either Appellant or his

co- defendant if Detective Piree had not picked out their photographs and specifically displayed them. N.T., 5/25/94, at 139-40, 146. The witness also testified that he was unable to identify Appellant at the pre-trial hearing. ***Id***. at 130-31. Under cross-examination, the witness fully disclosed the fact that before trial, he remained unsure of who really committed the crimes and that Detective Piree kept showing him photographs and clearly expected the witness to implicate someone. ***Id***. at 130-146.

The basis for trial counsel's decision not to seek suppression of Mr. Fisher's identification is obvious of record from the manner in which the witness was cross-examined at trial. The witness's testimony concerning the circumstances surrounding his pre-trial identification of Appellant's photograph clearly was relevant to trial counsel's strategy of proving that the police were trying to frame Appellant for a crime he did not commit so they could close their books on the incident. Trial counsel wanted to demonstrate the overreaching behavior in which Detective Piree engaged and the lengths to which the detective was willing to go to frame Appellant. Letting the jury hear that Detective Piree essentially coerced Mr. Fuller into identifying photographs of Appellant and his co-defendant materially advanced this strategy. We have considered the entirety of Mr. Fuller's testimony and find that the equivocal nature of his pre-trial identification was well emphasized during cross-examination. Under these circumstances, we conclude that trial counsel was not ineffective for failing to seek suppression, nor was he ineffective for failing to object to testimony that supported the defense theory that the police were framing Appellant. ***See Fletcher***, 561 Pa. at 292-93, 750 A.2d at 275 (if any reasonable basis is apparent of record for counsel's strategy, appellate courts will not find ineffectiveness).

Appellant next contends that all prior counsel were ineffective for failing to preserve multiple claims of prosecutorial misconduct predicated on seven instances of allegedly improper remarks that occurred at various stages of the trial. As a general matter, a prosecutor is allowed to vigorously present and argue his case, as long as the comments are supported by evidence and inferences which are reasonably derived from that evidence. ***Commonwealth v. Kemp***, 562 Pa. 154, 162, 753 A.2d 1278, 1281 (2000). Moreover, the prosecutor's comments must be evaluated in the context in which they were made and not taken as isolated fragments. ***Commonwealth v. Carpenter***, 533 Pa. 40, 48-49, 617 A.2d 1263, 1267 (1992). An attorneys' statements or questions at trial are not evidence. ***Kemp***, 562 Pa. at 162, 753 A.2d at 1282.

Our standard for evaluating a claim of prosecutorial misconduct is as follows:

> The primary guide in assessing a claim of error of this nature is to determine whether the unavoidable effect of the contested comments was to prejudice the jury, forming in their minds fixed bias and hostility towards the accused so as to hinder an objective weighing of the evidence and impede the rendering of a true verdict. In making such a judgment, we must not lose sight of the fact that the trial is an adversary proceeding, and the prosecution, like the defense, must be accorded reasonable latitude in fairly presenting its version of the case to the jury.

Commonwealth v. Chmiel, 777 A.2d 459, 464 (Pa. Super. 2001), *appeal denied*, ___ Pa. ___, ___ A.2d ___ (2001)

(decided October 11, 2001) (citations omitted). The focus of our consideration with regard to a claim of prosecutorial misconduct is to determine whether the defendant was deprived of a fair trial and not whether the defendant was deprived of a perfect trial. ***Kemp***, 562 Pa. at 162, 753 A.2d at 1282.

Appellant first complains that the prosecutor committed misconduct when he asked Mr. Young, "Do you want to be charged with perjury?" N.T., 5/25/94, at 30. When viewed in its proper context, this question was not improper. This query occurred after Mr. Young testified that, contrary to the second signed statement he gave to the police, he did not see co-defendant Shaurn Thomas at the scene of the crime. Specifically, the witness stated the following:

> [By Mr. Young]: After he [Detective Piree] told me I could be arrested, he said, "this is what you say." He asked me what happened. I told him I was standing there and a guy came in and robbed Mr. Harry and shot him, or whatever.
>
> He said, "Did you see Shaurn at the door," and all of this and I was like, "No." I kept saying no and he was like, "Well, evidently Shaurn must have been there," and all of this and all that. I was like, "How can he be there, I couldn't see him?"
>
> He was like, "Do you want to go down for this murder? Do you want to get charged for this murder," and I am like, "No. What am I going to be doing in jail for something I didn't have nothing to do with it?"

> Q. [By the prosecutor] Do you want to be charged with Perjury?

N.T., 5/25/94, at 30. Co-defendant's counsel immediately objected to the question, and the trial court sustained the objection. ***Id.***

The prosecutor's question fell within the "rhythm" of the language used by the witness and constituted a fair response to Mr. Young changing his story from the last statement he gave to the police. Moreover, there was no need for trial counsel to object to this question since counsel for co-defendant did so. The incident was brief, the prosecutor did not employ the term "perjury" again, and the prosecutor's reaction constituted an understandable response to the witness recanting the second statement he provided to the police. Moreover, the prosecutor questioned the witness extensively concerning the different versions of events that Mr. Young had provided at trial and in his various pre-trial statements, and the witness was subject to cross-examination, redirect, and re-cross on all of these points. Thus, the jury was not left to speculate on the truth of the witness's averments; they were fully apprised of the facts they needed to make their own credibility determination. We agree with the PCRA court that this claim does not provide grounds for relief.

Appellant next contends that it was unduly prejudicial for the prosecutor to unfairly bolster the credibility of police witnesses by indicating during closing that Detective Piree "solved the murder." In general, closing remarks are evaluated within the context in which they were made. ***Commonwealth v. Ligons***, ___ Pa. ___, ___, 773 A.2d 1231, 1238 (2001). Although a closing argument must be based upon

evidence in the record or reasonable inferences therefrom, a prosecutor is permitted to respond to defense evidence and to engage in oratorical flair. ***Id.*** When viewed in full context, the prosecutor's remark constituted a fair and proper comment on the evidence adduced at trial concerning Mr. Young's allegations that he was coerced by Detective Piree to fabricate evidence for the police. The clear implication of the defense theory was that Detective Piree was, at best, incompetent and, at worst, was a criminal himself. To counter this defense tactic, the prosecutor argued as follows:

> [Detective] Piree did good police work. He reasoned like this; son, we know you were there when it happened and we know you know who did it. We know they came in behind you. We know that you were friendly with the doers. People will think you had something to do with this.
>
> Piree said I did not ever consider him a suspect. When you use that leverage to pry from this kid the truth, it fits. Now is that not good police work? ***He solved the murder.*** According to the evidence, the murderers are sitting right there in front of your face.

N.T., 5/26/94, at 82 (emphasis added). A prosecutor is remiss in his duties if he does not attempt to support the testimony of a Commonwealth witness whose credibility has been attacked by the defense. ***Commonwealth v. Barren***, 501 Pa. 493, 499, 462 A.2d 233, 235 (1983).

Closing remarks will not warrant relief unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility

toward the defendant so they are unable to weigh the evidence objectively and render a true verdict. ***Ligons***, ___ Pa. at ___, 773 A.2d at 1238. We agree with the PCRA court that the challenged remark by the prosecutor comported with the evidence, constituted a fair response to defense contentions, and could not have prejudiced the jury so as to prevent them from rendering a true verdict. Moreover, under ***Barren, supra,*** we would be required to deem the prosecutor deficient in the performance of his duty if he had not attempted to convince the jury that Detective Piree was a reliable witness who had followed sound investigative tactics. We find this claim to be meritless. ***See*** PCRA Court Opinion, 6/27/00, at 3 (concluding that Appellant's trial was not marred by prosecutorial misconduct).

Appellant's next two claims center on allegations that the prosecutor improperly expressed his belief that Mr. Young was telling the truth when he gave his second statement to the police. Appellant's Brief at 34 (citing N.T., 5/26/94, at 80, 94, 101-103). A prosecutor's comment on the credibility of a witness is not reversible error if it constitutes a reasonable response to a prior attack on the credibility of that witness by the defense. ***Commonwealth v. Rios***, 546 Pa. 271, 290, 684 A.2d 1025, 1034 (1996). We have reviewed the prosecutor's remarks in their full context. We agree with the Commonwealth's assertion that the challenged remarks constitute a proper comment by the prosecutor on defense attempts to characterize the second statement Mr. Young gave the police as unreliable and coerced. The prosecutor was not improperly offering his personal opinion on the veracity of this witness. Rather, he was discussing the contradictory versions of events proffered by the witness, and commenting on Mr. Young's motivation to tell the truth the second time he was interviewed by the police. We find no merit to these contentions.

Appellant's fifth complaint of misconduct is that the prosecutor portrayed Commonwealth witness Christopher Young as an honorable man of integrity despite the fact that he was arrested four times in 1993 on charges ranging from aggravated assault to possession of contraband substances. The prosecutor made no such assertion during closing. What the prosecutor actually said was "[m]aybe the young man has a shred of honor" and "[m]aybe he is an honorable kid[.]" N.T., 5/26/94, at 90. The remarks were made in the context of discussing Mr. Young's possible motives to lie and his countervailing motives to tell the police the truth in his second statement. As such, they constitute a proper response to the defense contentions of evidence fabrication. Furthermore, the prosecutor never told the jury that Mr. Young displayed honor or possessed integrity. Rather, he asked the jury to answer the question for themselves, based on the evidence adduced at trial, of whether the witness was honorable or displayed integrity. This claim also is meritless.

Appellant next accuses the prosecutor of testifying to facts not in evidence during his closing argument. The prosecutor stated the following:

> Remember, I read the notes from the preliminary hearing when Bill Fisher, said, "Mr. Fuller, as I look around the courtroom throughout your testimony, I noticed people staring at you. Do you know any of those people?"

N.T., 5/26/94, at 83-84. In fact, the prosecutor had read those very words to Mr. Fisher during the previous day's testimony. N.T., 5/25/94, at 147. The point of reading the statement to the witness, and the purpose of bringing the

matter up during closing, was to emphasize the fact that Mr. Fuller was a friend of the decedent, had no motive to lie, and wanted justice to be done. Moreover, as discussed more fully *infra*, Mr. Fisher was both nervous and intimidated by the prospect of testifying in a court proceeding. This was, at least in part, attributable to his dislike of being the focus of people's attention at the preliminary hearing. The prosecutor's statements were a fair response to defense efforts to portray the witness as uncertain and constituted a proper comment on evidence adduced at trial. The challenged remarks provide no basis for relief.

Appellant also objects to portions of the prosecutor's opening statement which referred to the victim, Harry James, as a man who gave candy to neighborhood children. In the first place, as explained below, this is an incorrect characterization of the prosecutor's opening statement. Secondarily, the prosecutor's remarks were well within the permissible ambit established by Pennsylvania law.

A prosecutor's opening remarks must be based on evidence that he plans to introduce at trial and must not include mere assertions designed to inflame the jury's emotions. ***Commonwealth v. Begley***, ___ Pa. ___, ___, 780 A.2d 605, 626 (2001). However, a prosecutor's opening statements may refer to facts that he reasonably believes will be established at trial. ***Id***. The prosecution, as well as the defense, is afforded reasonable latitude in presenting opening arguments to the jury. ***Id***. Relief will be granted for prosecutorial misconduct only if the unavoidable effect of the prosecutor's conduct was to prejudice the jury so as to form in their minds a fixed bias towards the accused and to impede their ability to objectively weigh the evidence and render a true verdict. ***Id***.

In the instant case, the prosecutor's opening statement explained to the jury what the victim did to earn money, what a speakeasy is, and what type of place the victim's speakeasy was. Viewed in full context, it is clear that the prosecutor was properly informing the jury of the nature of the crime scene and that children were frequently to be found in the victim's establishment.

The prosecutor also commented properly upon the fact that, although the victim was himself a criminal in that he violated Pennsylvania's liquor control laws, Mr. James was not devoid of respect for his community, nor was he so far outside the pale as to deserve no protection from the law.

> This case is about a man named Harry James, not the one who played the trumpet but a little man who was 67 years old, who lived in North Philadelphia. He lived in a house, 1227 North 31st Street, somewhere around 31st and Girard.
>
> Besides living there, he operated what was called, or is called a speakeasy. For anybody who doesn't know what a speakeasy is, it is a place without a license where you can buy beer and other things. Harry sold mostly beer to his neighbors and his acquaintances. In fact, if he didn't know you, he wouldn't let you in. He was well-known throughout the community. The evidence will show all of this.
>
> The evidence will also show that besides selling beer, he kept candy and chewing gum and cigarettes, potato chips, and he would sell that to kids. Sometimes he would give it to

> them. They were in and out of the house, too. You could go by Mr. Harry's, as they called it, Mr. Harry's, and you could get a beer and sit down and watch a ball game, or play a game of chess with him. Yes, chess. Just rest your bones.
>
> He always had food in the house. If you were hungry, you could get something to eat. Sometimes he charged you for it, and sometimes he didn't. That is the kind of place it was.

N.T., 5/24/94, at 86-87.

The evidence at trial did, in fact, establish that Mr. James provided candy and potato chips to neighborhood children. N.T., 5/25/94, at 112 (testimony of Peter Fuller). The prosecutor's extremely brief reference to the fact Mr. James sometimes gave candy to children simply is not the type of comment that irreparably prejudices a jury so that they become incapable of rendering a true verdict. "[A]pellate courts will only grant relief for prosecutorial misconduct where the unavoidable effect of the prosecutor's actions was to prejudice the jury so that it destroyed the jury's ability to weigh the evidence in a neutral manner." ***Begley***, ___ Pa. at ___, 780 A.2d at 627. We find no basis on which we could grant the relief Appellant requests.

Appellant also contends that the aggregate effect of the prosecutor's conduct, as discussed above, entitles him to a new trial. It is well established that the cumulative effect of meritless claims cannot serve as grounds for relief. ***Commonwealth v. Baez***, 554 Pa. 66, 118, 720 A.2d 711, 737 (1998). The cumulative effect of non-existent errors is a

nullity, and we decline to find ineffectiveness for failing to preserve and argue meritless issues.

Appellant's eighth assertion is that all prior counsel were ineffective for failing to preserve the claim that he was denied a fair trial on the grounds that trial counsel never secured a jury charge on "prior bad acts" or "other crimes" evidence. Appellant explains the crux of this claim as follows:

> During trial, the Commonwealth elicited testimony that fifteen (15) people were in the preliminary hearing courtroom "staring" at Mr. Fuller to get him to give testimony favorable to the defense. Fuller then said that he was scared and intimidated by this and that is why he did not identify Appellant.

Appellant's Brief at 36. We find this claim meritless for several reasons. First, "staring" is not a recognized crime in Pennsylvania. Second, the "staring" was performed by fifteen people, not including Appellant. Thus, even if "staring" were to be deemed a crime, Appellant cannot be implicated in its commission. Finally, if one considers Mr. Fuller's testimony in context, it is apparent that the witness was explaining his nervousness and confusion as to the entire process of appearing in court and that he was not accusing Appellant of threatening him.

During his testimony, Mr. Fuller commented on his nervousness at the preliminary hearing and the fact that he disliked being the center of attention in a courtroom proceeding, as a testifying witness necessarily is. Mr. Fuller also stated that he was profoundly upset at having to answer questions under such circumstances, and that he felt pressured

because he had never been in court before. ***See*** N.T., 5/25/94, at 132-34, 147 (testimony of Peter Fuller). The witness's statements that people staring at him made him nervous and upset, when viewed in this context, cannot possibly be deemed to reference "other crimes" or "prior bad acts" by Appellant. No relief is warranted on this claim.

Appellant next argues that he was denied a fair trial because the trial court did not give an accomplice instruction concerning Mr. Young, and all prior counsel were ineffective for failing to preserve this issue. Appellant was not entitled to such an instruction. A trial judge is not obliged to instruct the jury on legal principles that do not apply to the facts adduced. ***Commonwealth v. Manchas***, 633 A.2d 618, 627 (Pa. Super. 1993). "There must be some relationship between the law upon which an instruction is required and the evidence presented at trial." ***Id***. In this case, Mr. Young was not charged as an accomplice. Moreover, the evidence adduced at trial established that he declined Appellant's invitation to participate in the robbery of the speakeasy. We agree with the PCRA court's analysis of this issue. ***See*** PCRA Court opinion, 6/27/00, at 2. Even if trial counsel had requested an accomplice charge, there was no basis on which the trial court could have predicated one. Therefore, this argument will not support a finding of ineffectiveness. ***See Roberts***, 545 Pa. at 465, 681 A.2d at 1276 (counsel cannot be deemed ineffective for failing to raise a meritless claim).

Appellant's final contention is that the trial court erred in giving a "progression" or "acquittal first" charge, and all prior counsel were ineffective for failing to argue and preserve this issue. Appellant does not contend that the instruction, as given, constituted an improper "progression charge." Rather, he argues that this type of jury instruction is constitutionally infirm.

Appellant has cited a plethora of cases from other jurisdictions to support his theory that a progression charge is unconstitutional and unduly coercive. However, Pennsylvania law is clear that progression charges are indeed proper in homicide cases. ***Commonwealth v. DuPont***, 730 A.2d 970, 985 (Pa. Super. 1999), *appeal denied*, 561 Pa. 669, 749 A.2d 466 (2000), *cert. denied*, 530 U.S. 1231 (2000). As a general rule, a progression instruction is proper when a defendant is charged with different degrees of the same crime. ***Commonwealth v. Sneeringer***, 668 A.2d 1167, 1170 (Pa. Super. 1995). In the present case, Appellant was charged with both first- and second-degree murder. We conclude that the trial court did not err in giving a progression charge, and that Appellant is not entitled to relief on this claim.

Order affirmed.

Judgment Entered.

/s/ David A. Szewczak
Prothonotary

Date: DEC. 12, 2001